Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner,

vs.

THE SUPREME COURT OF GUAM, Territory of Guam,

Respondent,

THE LONG-TERM CREDIT BANK OF JAPAN, LTD.,

Real Party In Interest.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

By the Organic Act of Guam, 48 U.S.C. § 1424-2, Congress conferred jurisdiction on the Court of Appeals for the Ninth Circuit to review *final* decisions of the Guam Supreme Court, Territory of Guam, by writ of certiorari.

1. Under 48 U.S.C. § 1424-2, may the Ninth Circuit refuse to decide whether a decision of the Guam Supreme Court is final and nevertheless discuss the merits of the petition in a published opinion that denies certiorari?

2. Is Ninth Circuit Rule 6-2(f) referring certiorari petitions to a three-judge motions panel inconsistent with congressional intent in 48 U.S.C. § 1424-2 that the Ninth Circuit would provide oversight to Guam's developing appellate system by judges familiar with the Territory and that it would promulgate procedural rules therefore that would resemble this Court's certiorari rules?

3. Can the Ninth Circuit avoid deciding whether Rule 6-2(f) is valid by failing to follow that Rule in deciding a petition attacking the Rule?

4. By enacting 11 Guam Code Ann. § 106730 that exempted foreign corporations making loans secured by Guam real property from compliance with "[t]his Chapter [106]", did Guam thereby also exempt foreign corporations doing such business from complying with its comprehensive licensing and regulatory statutes found in other Chapters and Titles of its Codes?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: petitioner EIE Guam Corporation, The Supreme Court of Guam, Territory of Guam, respondent and The Long-Term Credit Bank of Japan, Ltd., real party in interest.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29, EIE Guam Corporation states that its parent corporations/majority shareholders are EIE International Corporation, a Japanese corporation, and Henshaw Group Ltd. Neither EIE Guam Corporation, EIE International Corporation nor Henshaw Group Ltd. have issued publicly traded stock.

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PETITION FOR WRIT OF CERTIORARI

EIE Guam Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, No. 98-71416, certified for publication, has been published in 191 F.3d 1123, 1999 U.S. App. LEXIS 21561, 99 Cal. Daily Op. Service 7440, 99 Daily Journal DAR 9447 (9th Cir. Sept. 9, 1999). (Appendix ("App.") 1-10.) The opinion of the Supreme Court of Guam is unpublished. (App. 11-26.) The Ninth Circuit's order denying the petition for rehearing is unpublished. (App. 27.) The Supreme Court of Guam's order denying petitioners' petition for rehearing is unpublished. (App. 28.) The opinion of the Superior Court of Guam disqualifying respondent's counsel, Shearman & Sterling, is unpublished. (App. 43-86.)

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on September 9, 1999. The Court of Appeals denied a timely petition for rehearing and suggestion for hearing *en banc* on October 20, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND CIRCUIT RULE PROVISIONS INVOLVED

A. Federal Constitution, Statutes and Rules

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

The Organic Act of Guam, 48 U.S.C. § 1424-2, provides:

> The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: *Provided*, That for the first fifteen years following the establishment of the appellate court authorized by §1424-1(a) of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on

> Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(Emphasis added.)

28 U.S.C. § 2071(a) provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Ninth Circuit Rule 6-2 entitled "Petition for Writ of Certiorari to Review Final Decisions of the Supreme Court of Guam" provides, in pertinent part:[1]

> a. Petition for Writ of Certiorari.
>
> (1) A review of final decisions of the Supreme Court of Guam may be sought pursuant to 48 U.S.C. § 1424-2 by filing a petition for a writ of certiorari with the Clerk of the Court of Appeals within 40 days from the entry of the final decision of the Supreme Court of Guam in both civil and criminal cases . . . .

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[1] The complete text of Ninth Circuit Rule 6-2 is set forth in App. 90-93.

* * *

f. Disposition of the Petition. The petition any [sic] response(s) shall be referred to a motions panel for disposition. If a petition for a writ of certiorari is granted, the case will be scheduled for briefing and oral argument, if necessary.

B. Guam Statutes

11 Guam Code Ann. § 70130 provides in pertinent part:

> **Restriction of Activities on Persons Without Licenses.**
>
> It is the policy of the government of Guam that all businesses have business licenses. Therefore:
>
> (a) [This subsection provides the procedure for obtaining from the Guam Department of Revenue and Taxation an exemption from licensing requirements.]
>
> * * *
>
> (d) no commercial activity (including operating or leasing of real property) doing business on Guam without a business license may file suit in Guam courts until such time that a business license is obtained. No person engaged in commercial activity without a business license may use the courts to enforce, directly or indirectly, any obligation, lien, or contract incurred during the period of such commercial activity without a business license.

(App. 98-99.)[2]

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[2] The complete text of 11 Guam Code Ann. § 70130 is reproduced in App. 98-99.

18 Guam Code Ann. § 7104 provides:

> **Foreign corporation license. Certificate of registration. Prerequisite. Penalty.**
>
> No foreign corporation or corporation formed, organized, or existing under any laws other than those of Guam shall be permitted to transact business in Guam or maintain by itself or assignee any suit for the recovery of any debt, claim, or demand whatever, unless it shall have the foreign corporation license and certificate of registration prescribed in this Chapter.

(App. 110.)

11 Guam Code Ann. § 106727 provides, in pertinent part:

> **Business Which May be Transacted in Territory.** A foreign banking corporation which is authorized *by license* under §106725 *may transact in this Territory the business of . . . making loans* . . . .

(App. 107; boldface in original; italics added.)[3]

11 Guam Code Ann. § 106730 provides:

> **Loans Secured by Mortgages on Real Property and Acceptance of Assignments of Mortgages Covering Real Property in Territory.** Nothing in this Chapter shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this Territory for the transaction of business from making loans in this Territory secured by mortgages on real property or from accepting assignments of mortgages covering real property situated in this Territory.

(App. 107.)

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[3] The complete text of 11 Guam Code Ann. § 106727 in context is in App. 107.

11 Guam Code Ann. § 35105, Guam's American Investors Act, provides:

> **Filing & Effect of Statement.** Before engaging in Guam in any of the activities specified in §35104, an American lender shall execute and file with the Director of Revenue & Taxation a statement. The statement shall list its name, state of incorporation or organization, and principal place of business, shall certify that its principal activities are conducted outside Guam, and shall appoint irrevocably the Director and his successors its agents upon whom may be served process against it on any proceeding or cause of action arising out of its engaging in this Territory in any of the activities referred to in §35104. Until that statement is filed the immunities provided in this Chapter do not become operative. Upon the filing of the statement and after a determination by the Director that the American lender qualifies for exemption under this Chapter, the immunities provided by this Chapter shall continue operative until the statement is withdrawn by the American lender or cancelled by the Director pursuant to §35106, but no such withdrawal or cancellation shall retroactively affect or impair any of the immunities provided by this Chapter.

(App. 101.)

STATEMENT OF THE CASE

This litigation arises from a series of transactions between petitioner EIE Guam Corporation ("EIE Guam"), a Guam corporation, and The Long-Term Credit Bank of Japan, Ltd. ("LTCB"), a Japanese corporation, the real

party in interest. On July 15, 1992, LTCB entered into a construction loan agreement and associated mortgages, guarantees and guarantee mortgages with EIE Guam under which LTCB lent dollars to EIE Guam to build the Hyatt Regency Hotel in Guam. The agreement and the loan documents, prepared by LTCB's American lawyers, adopted the law of Guam. The loan was secured by Guam real property mortgages. EIE Guam filed its complaint in 1995 to set aside the mortgages and other security interests on the grounds of fraud, breach of fiduciary duties, breach of contract, and violation of Guam's lender liability laws. LTCB answered and filed counterclaims to foreclose the security.

On December 19, 1995, EIE Guam moved for summary judgment on LTCB's counterclaims. It produced uncontradicted evidence that LTCB had never sought nor received from the government of Guam a business license, a foreign corporation license, a certificate of registration nor a statement of exemption as required by Guam statutes to enable a corporation or other person doing business in Guam to obtain affirmative relief from its courts. EIE Guam also produced uncontradicted evidence that LTCB had been conducting millions of dollars of business in Guam for many years through representatives in Guam and that it maintained an office on the site of the construction of the Hyatt Hotel while the hotel was built.

EIE Guam relied on 11 Guam Code Ann. § 70130 (App. 98-99) and 18 Guam Code Ann. § 7104 (App. 110), each of which foreclosed LTCB from obtaining any affirmative relief from the courts of Guam because it had not complied with Guam's licensing, regulatory and taxing

statutes. LTCB argued that 11 Guam Code Ann. § 106730 exempted it from complying with *any* of Guam's licensing and regulatory statutes. Section 106730 provides:

> *Nothing in this Chapter* shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this Territory for the transaction of business from making loans in this Territory secured by mortgages on real property or from accepting assignments of mortgages covering real property situated in this Territory.

(App. 107; emphasis added.)

The Guam Superior Court rejected LTCB's argument and granted summary judgment because 11 Guam Code Ann. § 70130 and 18 Guam Code Ann. § 7104 each foreclosed its counterclaim. (App. 29-42.) Section 7104 provides:

> **Foreign corporation license. Certificate of registration. Prerequisite. Penalty.**
>
> No foreign corporation or corporation formed, organized, or existing under any laws other than those of Guam shall be permitted to transact business in Guam or maintain by itself or assignee any suit for the recovery of any debt, claim, or demand whatever, unless it shall have the foreign corporation license and certificate of registration prescribed in this Chapter.

(App. 110.)

LTCB appealed to the Guam Supreme Court, and EIE Guam responded. The Department of Revenue and Taxation of the Government of Guam filed an amicus curiae brief supporting EIE Guam. (That Department is responsible for business regulation in Guam and acts as the local

taxation authority.) The Department's brief explained in detail why section 106730 did not exempt LTCB from Guam's licensing, regulatory and taxing statutes.

The Guam Supreme Court reversed on the ground that 11 Guam Code Ann. § 106730 exempted LTCB from the business license requirement of 11 Guam Code Ann. § 106721. Its opinion never mentions the impact of 18 Guam Code Ann. § 7104, which also foreclosed LTCB's cross-claim. Section 7104 (App. 110) is not in the same Chapter or the same Title as 11 Guam Code Ann. § 106730 (App. 103-104), and was enacted many years before section 106730.

In its opinion, the Guam Supreme Court never discusses the impact of its decision on the American Investors Act (11 Guam Code Ann. § 35105), which provides that regulated American lending institutions may make loans and receive security for loans without violating Guam's business license laws only after they file a statement with the Department of Revenue and Taxation, nor explains why foreign lenders would be held to a lesser standard than that applied to American lenders. Effectively, the Guam Supreme Court's opinion permits foreign lenders to make loans and receive mortgages for such loans without complying with Guam's important statutory scheme of regulating and licensing businesses, while at the same time American lending institutions must register with the Department of Revenue and Taxation before being relieved of obligations imposed by Guam's business license laws.

EIE Guam filed a petition for rehearing pointing out the serious errors of fact and law in the opinion.[4] It also argued that the court's construction of section 106730 created an arbitrary classification in violation of the Equal Protection Clause of the United States Constitution: (1) Foreign corporations making loans secured by mortgages on Guam real property without an office address in Guam are exempt from Guam's licensing statutes, but (2) domestic and foreign corporations with an office address in Guam, in all other respects identically situated to those corporations in the first class, must comply with Guam's licensing laws. No difference exists between the two classes that has any substantial relation to the object of the legislation. This error is further illuminated when read against Guam's American Investors Act. The petition was denied.

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[4] *E.g.*, the Supreme Court stated that the loan to EIE Guam was negotiated, approved and executed in Japan and the amounts denominated in yen. (App. 13.) The facts with respect to the negotiation, approval, execution and performance of the loan transactions are at issue in EIE Guam's complaint and LTCB's answer; those disputed facts were not at issue in EIE Guam's summary judgment motion, which solely was directed to LTCB's counterclaims. Hence, the validity of LTCB's security interests could not be resolved on summary judgment (nor should they have factored into the Guam Supreme Court's decision) as those factual and legal questions were not before the Guam Superior Court. Further, the record is clear that the loans were in the English language and denominated in dollars, not yen. Finally, the Guam Supreme Court never explained how the exemption under section 106730 properly could be applied to LTCB when it had not limited its security to Guam real estate and when its activities otherwise exceeded the narrow scope of section 106730.

On December 8, 1998, EIE Guam filed its petition for certiorari in the Ninth Circuit explaining why the Guam Supreme Court prejudicially erred in expanding the narrow exemption of section 106730 to defeat Guam's comprehensive licensing and regulatory statutes. It also attacked Ninth Circuit Rule 6-2(f) as inconsistent with congressional intent in passing 48 U.S.C. § 1424-2: Congress intended that the decisions of Guam's new appellate court be reviewed by judges of the Ninth Circuit who would provide judicial oversight to the fledgling appellate system and who would be familiar with Guam's problems.[5] Because Congress also expected to transfer certiorari jurisdiction from the Ninth Circuit to this Court when the Guam Supreme Court becomes 15 years old, its intent is implicit that the Ninth Circuit should develop procedural rules with respect to such petitions that resemble this Court's certiorari procedure. Rule 6-2 does not do so, and only by happenstance would even one of the three judges sitting on a motions panel be "familiar with local traditions" in Guam. Because Rule 6-2(f) is

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[5] Senator Weicker, who sponsored the amendment that became section 1424-2 and who is Chair of the Senate Committee that had revised the House version of the Bill, explained: "[D]uring the formative years of the new appellate court [of Guam] and while it establishes its institutional traditions, all decisions of that court should be reviewable by a court of appeals which is familiar with local traditions." 130 *Cong. Record* 23782 at 23790 (1984). He also presented to the Committee his Subcommittee's Report stating that "[t]he quality of the judicial process, however, is of critical concern and cannot be properly evaluated until after the establishment of the local appellate court." *Id.*

inconsistent with 48 U.S.C. § 1424-2, it also violates 28 U.S.C. § 2071(a).

Unlike this Court's procedure, only the three judges on the Ninth Circuit panel voted on the certiorari petition. If that court were to emulate this Court, at least nine judges would vote. This case never was briefed on the merits. Instead, the panel set the petition for oral argument on the petition and answer. Although the validity of Rule 6-2(f) was orally argued, the panel said nothing about the court's reference to a merits panel until the opinion came down.[6]

The Ninth Circuit's decision on the petition for certiorari therefore was made in violation of its own rules. Unless and until a court changes its procedural rules after notice or the rules are otherwise invalidated, the rules bind the court as well as the parties because they have the force of a statute. *Galveston Dry Dock & Constr. Co. v. Standard Dredging Co.*, 40 F.2d 442, 444 (2d Cir. N.Y. 1930) (J. Hand) ("It [a court rule] is the result of the exercise of a power to legislate, delegated by Congress, though circumscribed by the statute which gives it, and by anything contained in the general laws, or the Supreme Court rules, as the statute itself declares. . . . [W]e are as much bound to observe it as a statute.").

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[6] The panel disposed of the point in a footnote: "EIE Guam has challenged that portion of local Rule 6-2 that directs petitions for certiorari to motions panels for disposition, *see* Rule 6-2(f), as contrary to the Congressional intent behind § 1424-2 to have the Ninth Circuit exercise supervisory power over the Guam Supreme Court. Because this petition was referred to a merits panel, rather than a motions panel, we need not resolve the issue." (App. 4, n.4.) The panel missed the point of the argument.

Additionally, the panel refused to decide whether Guam's Supreme Court decision was final as required by 48 U.S.C. § 1424-2:

> The arguments for and against jurisdiction are in equipoise. In this unusual circumstance, we will assume that we have jurisdiction without deciding that difficult issue, because our disposition of the petition for certiorari will be the same as it would if we were to hold that we lack jurisdiction.

Slip Op. at 11180. (App. 9.)

As petitioner pointed out in its petition for rehearing and suggestion for rehearing *en banc*, federal appellate courts *must* decide finality issues because they are jurisdictional. *E.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 47-48, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (applying the principles of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981) (a finality requirement in section 1291 is jurisdictional, and a "court lacks discretion to consider the merits of a case over which it is without jurisdiction"); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 739-40, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976) (federal courts are required *sua sponte* to decide subject matter jurisdiction when finality issue exists); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374-75, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978) (federal courts can neither disregard nor evade deciding federal jurisdictional issues).[7]

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[7] The panel also erred in saying that the disposition would be the same if the court lacked jurisdiction. If the court lacked

The panel recognized that the law of the Circuit is that finality issues under section 1424-2 are decided on analogy to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) (practical finality is sufficient for subject matter jurisdiction in the Supreme Court with respect to at least four distinct categories of cases although further State court proceedings are pending). It also recognized the importance of the statutory issues to the economic future of Guam and its people. (App. 8-9.) It failed to recognize, however, that the Guam Supreme Court decision met the finality prerequisites that this Court has applied in deciding its own jurisdiction. The panel opinion nevertheless commented on the merits:

> The Guam Supreme Court's interpretation of the interplay of the various Guamanian statutes, however, offers a well-crafted analysis of the laws. The court explains in a thorough review of the overall statutory scheme and analysis of legislative purpose why the "nothing in this chapter" limitation of section 106730 does not leave foreign banks, operating under section 106730, subject to licensing under other chapters.

Slip Op. at 11180. (App. 9.)

As EIE Guam's petition for rehearing pointed out, neither the Guam Supreme Court nor the panel's

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jurisdiction, its sole power would be to dismiss the petition for want of subject matter jurisdiction and to vacate any opinion, order or judgment theretofore entered without jurisdiction. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18, 71 S. Ct. 534, 95 L. Ed. 702 (1951); *Liberty Mutual Ins. Co., supra*, 424 U.S. at 740 (vacation of judgment with direction to dismiss).

opinion analyzed the applicable laws.[8] Neither discussed 18 Guam Code Ann. § 7104 nor explained why the "nothing in this Chapter" limitation in section 106730 had any relevance to licensing and regulatory statutes that appear in different Chapters and Titles of the Guam Codes. The opinions do not explain how a statute exempting foreign corporations engaged solely in making loans secured by real property could apply to foreign corporations making loans secured by assets in addition to real property in Guam. The opinions also do not explain why foreign banks receive the benefits of an exemption from licensing requirements not permitted American lending institutions absent compliance with the American Investors Act, 11 Guam Code Ann. § 35105. Nevertheless, the petition for rehearing was denied. (App. 27.)

While the petition was pending in the Ninth Circuit, pretrial proceedings and discovery were being undertaken on the complaint and answer before the Guam Superior Court. EIE Guam's discovery revealed theretofore unknown documents which provided substantial evidence that LTCB's counsel, Shearman & Sterling, should be disqualified. EIE Guam moved to disqualify the firm which had theretofore represented LTCB in every phase of the litigation. The court wrote a lengthy opinion

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[8] The panel stated: "[T]he Guam Supreme Court held that the health, safety, and morals concerns that motivate the business licensing rules of Guam 'are not implicated by lending of a foreign bank which is secured by in state property.' " Slip Op. at 11178. (App. 7.) Guam's police power is necessarily "implicated" because licensing statutes are applications of the police power. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

disqualifying the firm. (App. 43-86.) The Guam Superior Court's opinion and order was promptly brought to the panel's attention before its opinion came down.

IMPORTANCE OF THE ISSUES PRESENTED

The stakes for the parties are very high, but the importance of the issues to the government and citizens of Guam presented by the petition far transcend the parties' individual interests. Exempting foreign corporations from the consequences of non-compliance with Guam's licensing, regulatory and taxing statutes seriously impacts Guam's economy and adversely affects all of its citizens. The Guam Supreme Court opinion is incorrect. The panel's comments about the Guam Supreme Court's decision raise grave concerns in Guam even though the panel's remarks have no preclusive effect. Any loss of the government's vital powers to license, regulate and tax foreign corporations doing business in Guam threatens the Territory's economic stability, especially because the Guam Supreme Court's decision (and that of the panel following it) creates an unequal preference for foreign banks over federally regulated American lenders.

If the panel had decided that it did not have jurisdiction, it should not have gratuitously commented on the Guam Supreme Court's opinion or the merits of the arguments. The fact that the panel made such comments without deciding its jurisdiction underlines the need for this Court, in the exercise of its supervisory powers, to help the Ninth Circuit better to perform its role in acting on

certiorari petitions to the Supreme Court of Guam as Congress intended.

The citizens of Guam and their government are entitled to the same dignity and respect in the Ninth Circuit as this Court gives to the citizens and governments of the several States. Unless this Court grants certiorari, the citizens of Guam will have reason to believe that the federal judiciary has not accorded to them the first class status that citizens of the States have enjoyed since the Republic was founded.

CONCLUSION

EIE Guam accordingly requests that the writ of certiorari be granted pursuant to 28 U.S.C. § 1651.

Dated: November 16, 1999

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EIE GUAM CORPORATION, *Petitioner,* v. THE SUPREME COURT OF GUAM, *Respondent.* THE LONG-TERM CREDIT BANK OF JAPAN, LTD., *Real Party in Interest.*	No. 98-71416 Supreme Court of Guam No. CVA96-017 OPINION

On Petition for a Writ of Certiorari
to the Supreme Court of Guam, Territory of Guam

Argued and Submitted
June 14, 1999 – San Francisco, California

Filed September 9, 1999

Before: Thomas G. Nelson, Michael Daly Hawkins, and Susan P. Graber, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Shirley M. Hufstedler, Morrison & Foerster, Los Angeles, California, for the petitioner.

Jaculin Aaron and William M. Burke, Shearman & Sterling, New York, New York, and G. Patrick Civille, Ching,

Civille, Calvo & Tang, Hagatna, Guam, for the real party in interest.

OPINION

HAWKINS, Circuit Judge:

EIE Guam Corporation ("EIE Guam") seeks certiorari review of a decision of the Supreme Court of Guam reversing the Guam Superior Court's summary judgment grant on a counterclaim filed by the Long-Term Credit Bank of Japan, Ltd. ("LTCB"). Review is sought of the Guam Supreme Court's holding, as a matter of Guam law, that an off-shore bank, without an office on Guam, entering into loans secured by Guam real property may maintain suit in the courts of Guam even if it has not complied with Guam's business licensing requirements. We deny the petition because we doubt that the decision here is final for purposes of review under 48 U.S.C. § 1424-2 and because, even if we were somehow able to construe the decision as final, it is not one that we would overturn.

In 1995, EIE Guam filed a complaint in Guam Superior Court against LTCB, seeking to set aside mortgages and security interests related to the financing of a resort hotel, and alleging that the mortgages had been fraudulently executed in favor of LTCB.[1] EIE Guam also alleged that LTCB had refused to complete financial restructuring, or to extend the loans, although they were not in default. LTCB counterclaimed against EIE Guam seeking,

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[1] EIE Guam also sued several other banks, which are no longer parties to this suit.

among other relief, foreclosure on the mortgages securing a construction loan.

EIE Guam moved for summary judgment on LTCB's counterclaims, making the undisputed assertion that LTCB did not possess a Guam foreign corporation license, business license, or statement of exemption, and arguing that it was thus barred from maintaining suit in Guam under 18 G.C.A. § 7104.[2] The Superior Court of Guam granted the motion for summary judgment on this basis, dismissing the counterclaims. The dismissal of the counterclaims was certified as a final judgment, and LTCB perfected an appeal to the Guam Supreme Court.

After briefing and argument, the Guam Supreme Court reversed the summary judgment on the counterclaims, construing another provision of Guam law, 11 G.C.A. § 106730,[3] in holding that "[t]he banking laws

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[2] 18 G.C.A. § 7104 provides:

> No foreign corporation or corporation formed, organized, or existing under any laws other than those of Guam shall be permitted to transact business in Guam or maintain by itself or assignee any suit for the recovery of any debt, claim, or demand whatever, unless it shall have the foreign corporation license and certificate of registration prescribed in this Chapter.

[3] 11 G.C.A. § 106730 provides:

> Nothing in this chapter shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this Territory for the transaction of business from making loans in this Territory secured by mortgages on real property or from accepting assignments of mortgages covering real property situated in this Territory.

addressing the conduct and activities of foreign banks do not require foreign banks, without offices on Guam, to obtain licenses [or exemptions], necessary for broader financial activities, in order to enter loans secured by Guam real property." Thus, an off-shore bank engaging in transactions under 11 G.C.A. § 106730 would not be barred from maintaining suit in Guam by 18 G.C.A. § 7104, as such transactions are exempted from the licensing requirements.

EIE Guam then filed this petition for certiorari pursuant to 48 U.S.C. § 1424-2 and Circuit Rule 6-2.[4]

I. Finality Required to Exercise Jurisdiction over the Petition.

Section 1424-2 grants to the Ninth Circuit "jurisdiction to review by writ of certiorari all **final decisions** of the highest court of Guam from which a decision could be had" for the first fifteen years following the establishment of the Supreme Court of Guam. 48 U.S.C. § 1424-2 (emphasis added). In a threshold challenge to this court's jurisdiction, LTCB argues that reversal of a grant of summary judgment is not a "final decision."

In 1981, we adopted the United States Supreme Court's analysis in *Cox Broadcasting Corp. v. Cohn*, 420 U.S.

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[4] EIE Guam has challenged that portion of local Rule 6-2 that directs petitions for certiorari to motions panels for disposition, *see* Rule 6-2(f), as contrary to the Congressional intent behind § 1424-2 to have the Ninth Circuit exercise supervisory power over the Guam Supreme Court. Because this petition was referred to a merits panel, rather than a motions panel, we need not resolve the issue.

469 (1975), to govern our determination of when a decision of the highest appellate court of Guam[5] is final, although further proceedings on the merits may remain. *See Guam v. Kingsbury*, 649 F.2d 740, 743 (9th Cir. 1981) (adopting *Cox Broad*casting and finding practical finality when an issue could not be raised in a later appeal). *Cox Broadcasting* elucidated four exceptions to strict finality in the similar circumstance of Supreme Court consideration of decisions by state courts in determining whether to exercise jurisdiction to review federal issues under 28 U.S.C. § 1257, although further proceedings in state court remain.

Unlike the Supreme Court in its review of state court decisions, however, this circuit has authority to review not only federal issues, but also all issues of local law. *See* 48 U.S.C. § 1424-2. Because of this broad authority – which we held equally over the old Appellate Division system, as we do over the Guam Supreme Court – the *Cox Broadcasting* framework has not been a perfect fit. In tailoring *Cox Broadcasting*'s categories to fit our review, we have held that we will consider all issues – both federal and territorial – to be federal for *Cox Broadcasting* purposes. *See Kiaaina v. Jackson*, 851 F.2d 287, 289 (9th Cir. 1988).

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[5] Before the Guam Supreme Court was established, the federal District Court of Guam had appellate jurisdiction over the Guam courts. Appeals were heard by three judge panels, consisting of a district judge of Guam and two other judges serving on, or assigned to, the district court. *See* 48 U.S.C. § 1424-3. Review of decisions by those panels was by this Court.

The fourth *Cox Broadcasting* exception – which allows for jurisdiction in circumstances in which a federal issue has been decided, proceedings may lead to a decision on non-federal grounds, but determination of the federal issue would immediately resolve the case and delay would erode a federal policy, *see Cox Broadcasting*, 420 U.S. at 483 – is the only exception on which EIE Guam relies that we believe could establish finality in the circumstances of this case. We agree with EIE Guam that three of this exception's prongs have been met: the Supreme Court of Guam has decided the issue; proceedings on remand could lead to a decision on other grounds; and a reversal on the issue would immediately resolve the counterclaim, as LTCB would no longer be able to maintain suit.[6]

We are uncertain, however, whether the final prong, the potential for delayed review of the issue to "seriously erode federal policy," *id.*, has been satisfied here. In evaluating this prong, we do consider the federal interest in final resolution of important issues of Guam law, *see Kiaaina*, 851 F.2d at 290. The proper focus of our inquiry, however, is on the significance of the issue of Guam or federal law, not on judicial economy and the advantages of a prompt resolution. *See id.*; *Guam v. Manibusan*, 729 F.2d 1236, 1238 (9th Cir. 1984).

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[6] Although resolution of the issue would resolve only the counterclaim, not the entire case, *Cox Broadcasting* speaks of the "relevant cause of action," rather than of the "case," in its discussion of exception four. *See Cox Broadcasting*, 420 U.S. at 483.

Here, the Guam Supreme Court held that the health, safety, and morals concerns that motivate the business licensing rules of Guam "are not implicated by lending of a foreign bank which is secured by in state property." EIE Guam argues that nonetheless this case presents an issue of statutory interpretation that is fundamentally important to Guam and to the national and international banking community that Guam relies on to build its future.

We have determined, in other contexts, that challenges to insurance policy exclusions, reversals of suppression orders in criminal cases, and denials of motions to dismiss indictments are all matters that " 'can await final judgment without any adverse effect' upon important federal or Guam interests" and that do not warrant the use of exception four for immediate resolution. *Kiaaina*, 851 F.2d at 291 (quoting *Flynt v. Ohio*, 451 U.S. 619, 622 (1981)); *see also Guam v. Mafnas*, 721 F.2d 683, 684-85 (9th Cir. 1983); *Manibusan*, 729 F.2d at 1238. In those cases, we found either that the issue presented was itself not so significant as to warrant excusing finality, or that the countervailing policy concern against piecemeal determinations – especially in criminal cases – was stronger.

This is not to say that the requirements of *Cox Broadcasting's* exception four cannot be met. We have held previously, for example, that determining the boundaries of jurisdiction of the juvenile courts of Guam is an important enough policy interest to excuse finality. *See Guam v. Quinata*, 704 F.2d 1085, 1087 (9th Cir. 1983). In *Wabol*, which involved the Northern Mariana Islands, we also excused complete finality, finding that determining the validity of restrictions on land purchases to those of

Northern Mariana descent, in the face of an equal protection challenge, was a significant policy concern for the territory. *See Wabol v. Villacrusis*, 958 F.2d 1450, 1455 (9th Cir. 1990). Although EIE Guam argues the Supreme Court of Guam's interpretation of the statute in this case raises the equal protection concerns present in *Wabol*, we cannot find that there is an issue of federal constitutional concern at stake here.[7]

Nonetheless, the question of statutory interpretation raised here seems to our eyes to be an issue of real

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[7] EIE Guam's equal protection argument hinges on a reading of the decision below that LTCB was entitled to an exemption, unavailable to banks with offices on Guam, even though LTCB, without an office, was transacting a scope of business that went well beyond taking off-shore security interests in Guam real property. We read the decision more narrowly. To our eye, the Guam Supreme Court construed the statutory scheme of Guam's business and banking regulation, but made no determination that LTCB was, as a matter of law, entitled to an exemption. The court did not foreclose EIE Guam from offering facts on remand to prove that LTCB should be precluded from sheltering within section 106730.

We also disagree with EIE Guam's contention that the Guam Supreme Court erred by deciding questions of disputed fact. The Superior Court's decision found undisputed only the facts that the LTCB was a foreign bank, making loans secured by Guam property, and not possessing a license or exemption from a license. That court explicitly stated that it saw all other facts as still contested, but that these undisputed facts were conclusive of the LTCB's ability to maintain suit. Although the Supreme Court briefly recounted the apparent history of the litigation in its opinion, it made no factual findings. All facts beyond those decided by the Superior Court appear to be open to contest on remand.

importance to the economic future of Guam and its people. The arguments for and against jurisdiction are in equipoise. In this unusual circumstance, we will assume that we have jurisdiction without deciding that difficult issue, because our disposition of the petition for certiorari will be the same as it would if we were to hold that we lack jurisdiction.

II. Exercise of Discretion to Grant Petition.

Even if our doubts about finality could be resolved, we do not see this as a case in which exercise of certiorari jurisdiction would be warranted.

EIE Guam attacks the Guam Supreme Court's interpretation of 11 G.C.A. § 106730, arguing that, even if section 106730 exempts off-shore banks taking security interests in real property from some regulation because of its "nothing in this chapter" language, as the business licensing requirements are not contained in Chapter Seven, they continue to apply to such banks. The Guam Supreme Court's interpretation of the interplay of the various Guamanian statutes, however, offers a well-crafted analysis of the laws. The court explains in a thorough review of the overall statutory scheme and analysis of legislative purpose why the "nothing in this chapter" limitation of section 106730 does not leave foreign banks, operating under section 106730, subject to licensing under other chapters. The court's observation of the absence in section 106730 of language requiring compliance with Guam law generally, as compared to the

otherwise parallel section 106731 that does require such compliance, buttresses their interpretation.[8]

This is an issue of local statutory interpretation, implicating no federal statutory or constitutional issue. Although Congress certainly has given us jurisdiction to review issues of local Guam law, we hesitate to use this authority where, on the merits, the Guam Supreme Court appears to have construed a Guam statute reasonably and fairly. Exercising our discretionary certiorari power here would undercut Congress's intent to allow Guam to develop its own, independent institutions. Moreover, as this is an issue of territorial law, the Guamanian legislature's ability to amend the statutes of Guam would seem a more than sufficient check on the Guam Supreme Court if, in the eyes of Guam's elected representatives, it had construed the statutory scheme contrary to the public policy of Guam.

The petition for certiorari is DENIED. All pending motions are DENIED.

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[8] EIE Guam also attacks the Guam Supreme Court's reliance on *Sondeno v. Union Commerce Bank*, 71 Cal. App. 3d 391 (1977). However, this circuit recognizes that, even when California law does not bind the interpretation of Guam statutes, it remains persuasive authority. *See Phoenix Eng'g and Supply, Inc. v. Universal Elec. Co.*, 104 F.3d 1137, 1141 (9th Cir. 1997).

IN THE SUPREME COURT OF GUAM

EIE GUAM CORPORATION, et al. Plaintiff-Appellee, vs. THE LONG TERM CREDIT BANK, OF JAPAN, LTD., et al., Defendant-Appellant.	Supreme Court Case No. CVA96-017 Superior Court Case No. CV1190-95 OPINION (Filed May 21, 1998)
THE LONG TERM CREDIT BANK, OF JAPAN, LTD., et al., Counterclaimant-Appellant, vs. EIE GUAM CORPORATION, et al. Counterdefendants-Appellees.	

Cite as 1998 Guam 6
On Appeal from the Superior Court of Guam
Argued and Submitted on February 18, 1998
Hågatña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, and JOSE I. LEON GUERRERO, Associate Justices.

SIGUENZA, CJ.:

I. Background

In the 1980's, Long Term Credit Bank of Japan (LTCB), a Japanese corporation, made loans to another Japanese corporation, EIE International (EIEI), in order to finance various construction projects. Consequently, EIE

Guam (EIEG) was specifically incorporated to develop and hold the now Guam Hyatt Hotel.

EIEI and EIEG initially invested $70-$150 million to develop the construction project. As security for the loans, LTCB obtained a mortgage on the hotel as well as interests in the hotel's equipment, accounts receivable, inventory, bank accounts, and contract rights. The loan transaction was made and approved in Japan, administered in Japan, and made payable in Japan. In 1992, an additional loan of $103 million was made directly to EIEG for purposes of completing the hotel. It is undisputed that this loan was also negotiated, approved, and executed in Japan and the amounts denominated in yen; nor is it disputed that performance, as well as the availability of the funds would be in Japan.

On August 2, 1995, a suit arose over the loan agreements. LTCB and four other Japanese banks were named as defendants.[1] EIEG filed the complaint to set aside the mortgages and the other security interests, maintaining that the mortgages were fraudulently executed in favor of LTCB upon instruction of LTCB when it took over EIEI's operation. EIEG also asserted LTCB refused both to complete the financial restructuring it had earlier begun or to extend its loans to EIEG although they were not in default. LTCB answered the complaint and filed counterclaims for foreclosure on the mortgages securing the construction loan used to develop the hotel.

EIEG moved for summary judgment on LTCB's counterclaims asserting LTCB did not have a Guam foreign

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[1] The four other banks were later dismissed from the case.

corporation license, a Guam business license, nor a statement of exemption. These assertions were not disputed.

At hearing, the lower court orally granted the motion for summary judgment and dismissed the counterclaims. A written Decision and Order was later issued supporting the trial court's earlier order. The court then certified the dismissal of the counterclaim as a final judgment which was entered on the docket on November 21, 1996. LTCB timely filed a Notice of Appeal on November 26, 1996.

II. Analysis

A review of the grant or denial of a motion for summary judgment is reviewed *de novo*. *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10, ¶ 7.

Title 11 of the Guam Code Annotated encompasses the Financial and Tax laws of Guam. This Title is divided into four divisions, including Division 3, entitled "Business License Law" and Division 4 entitled "Banks and Banking." The Banks and Banking division includes Chapter 106 on Banks which sets out statutes, located within Article 7, governing the operations of foreign banks on Guam.

Essentially all of Guam's current foreign banking provisions were enacted into law on December 11, 1975 via Guam Pub. L. 13-111:5. These foreign banking laws were added to Article III of the Title XXXI of the Government Code, adopted as an entirely new chapter, and did not expressly amend existing statutes. The Chapter

resulted in an area of law not previously addressed and mirrors almost exactly California's foreign banking laws.

LTCB asserts that, as a foreign bank, it need not comply with Guam's business licensing laws because of the language set forth in 11 GCA § 106730. This provision states:

> Nothing in this Chapter shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this Territory for the transaction of business from making loans in this Territory secured by mortgages on real property or from accepting assignments of mortgages covering real property situated in this Territory.

11 GCA § 106730 (1994). In order to understand this provision properly, it must be read in context with the other provisions set forth in the article 7. Essentially, each statute is linked to another by specific reference. The applicable statutes are listed below.

> **§ 106722. Right of Foreign Banking Corporation to Engage in Business.** A foreign banking corporation shall not engage in the banking or trust business in this Territory unless it is licensed to do so pursuant to the provisions of § 106725 and unless it first complies with all the provisions of this Chapter and then only to the extent expressly permitted in this Chapter or by regulations of the Board. In transacting such business a foreign banking corporation shall comply with all applicable provisions of this Title and of the laws of this Territory.

11 GCA § 106721 (1994).

§ 106722. Requirements to Do Business in Territory. A foreign banking corporation shall not commence to do business in this Territory until it has met the following requirements:

(a) It is authorized by its charter to transact the character of business described in § 106727 and has complied with the laws of the country under which it is incorporated.

(b) It has filed with the Commissioner a certified copy of its charter or articles of incorporation and of its by-laws and a copy of an application for a commercial license pursuant to § 72104 and § 72105 of this Code.

(c) It has furnished to the Commissioner such proof of the nature and character of its business and its financial condition, stock ownership and managements as he may require.

. . . .

(e) It has complied with all applicable requirements of the Title 18 Guam Code Annotated relating to foreign corporations **except matters specifically otherwise provided for in this Title.** (Emphasis added.)

. . . .

(i) It has received from the License Board of the Department a commercial license pursuant to § 72102.

11 GCA § 106722 (1994).

§ 106725. Approval of Application; Issuance of License; Transfer; Display. The Commissioner shall convey to the Board his recommendation

as to whether the application of a foreign banking corporation should be approved. The Board may, in its discretion, direct License Division of the Department to issue such license to such corporation when it is satisfied that the corporation has met all the requirements of this Chapter. The license shall authorize the corporation **to transact the business permitted by § 106727 at the location specified therein.** No such license shall be transferrable or assignable. Each such license shall be conspicuously displayed at all times in the, [sic] place of business specified therein. (Emphasis added.)

11 GCA § 106725 (1994).

§ 106727. Business Which May be Transacted in Territory. A foreign banking corporation which is authorized by license under § 106725 may transact in this territory the business of buying, selling, paying or collecting bills of exchange, or issuing letters of credit, of receiving money for transmission by draft, check, cable or otherwise, and of making loans. It may transact in this Territory the business of accepting deposits only as provided in § 106728.

11 GCA § 106727 (1994).

§ 106728. Accepting Deposits from Foreign State or Pperson [sic], Etc.

. . . .

(b) A foreign banking corporation may transact in this Territory the business of accepting deposits from any foreign state or from any person which resides, is domiciled, and maintains its principal place of business outside the

territory [sic] of Guam, if: (1) Such foreign banking corporation has complied with all of the requirements of § 106722; and (2) Such foreign banking corporation has received from the Commissioner his written approval to transact such business in this Territory.

(c) A foreign banking corporation which transacts such business in this Territory shall, with respect to business transacted by it in this Territory, comply with and be subject to the provision of this Title.

11 GCA § 106728 (1994).

§ 106729. Accepting Domestic Deposits. (b) A foreign banking corporation may transact in this Territory the business of accepting deposits from any person who is domiciled and maintains its principal place of business within the Territory if: (1) Such foreign banking corporation has complied with all of the requirements of § 106722; and (2) Such deposits may only be accepted from persons who are or were borrowers from a bank accepting the deposit, provided. . . .

11 GCA § 106729 (1994).

The law is clear that a foreign bank can engage in business only if it is properly authorized to do so. 11 GCA § 106721 (1994). A foreign bank is properly authorized to do business on Guam when it holds two licenses: 1) a Banking Business licensed issued pursuant to 11 GCA § 106725; and a Foreign Corporation License issued pursuant to 11 GCA § 106722(e). *Id.* When these licenses are obtained, a foreign bank may conduct the following specifically enumerated business transactions: buying,

selling, paying or collecting bills of exchange, issuing letters of credit, or receiving money for transmission by draft, check, cable or otherwise, and **making loans.** 11 GCA § 106727. If the criteria of 11 GCA §§ 106728 and 106729 are met, a foreign bank can also accept deposits from both foreign and domestic persons. Specifically **not enumerated** in §§ 106727, 106728 or 106729 is the securing of a loan with a mortgage on real property located in Guam by a foreign bank. The omission of this type of transaction from the activities requiring licensing evidences an intent by our legislature to exempt it from the licensing statutes. 2A *Sutherland Statutory Construction* § 47.23 (Rev. 5th ed. 1992).

The legislature's enactment of a specific statute distinguishing the transaction at issue is another compelling indication of the intent to exempt a foreign bank that enters into such a transaction from the licensing laws. The language of 11 GCA § 106730 states that "[n]othing in this Chapter shall be deemed to prohibit" a foreign bank from engaging in this type of mortgage transaction. This statute, coupled with the specifically listed business transactions in § 106727, shows that this type of transaction apparently does not require a license.

The state of California, from which Guam adopted its statute, has addressed the same issue now before us. In *Sondeno v. Union Commerce Bank,* 71 Cal.App.3d 391 (1977), a California appellate court had to decide whether an Ohio bank had charged a usurious interest rate. The issue dealt with the same statutory language limiting a foreign bank from doing business within the state without a license. *Id.* at 394. California law also contained a statute, similar to Guam's, permitting a foreign bank to

make a loan secured by real property within the state without a license. The *Sondeno* court read the statute permitting the loan secured by real property as "express permission for the transaction of such business." *Id.* at 395. Further, the requirements to otherwise conduct the other enumerated transactions of a licensed foreign bank were removed by this language. *Id.*

Likewise, in *Skylake State Bank v. Solar Heat and Insulation of Central Utah, Inc.*, 559 N.Y.S.2d 930 (Sup.Ct. 1990), a New York court made the same ruling when confronted with a similar situation. An out of state bank, not licensed in the state, loaned money to the defendants and secured the loan with a mortgage on New York property. *Id.* at 931. The defendants had opposed a summary judgment motion based on the bank's lack of authorization to do business in the sate. *Id.* at 931. They asserted that the bank could not bring an action in court pursuant to state law. *Id.* The court held that "[a]n analysis of the regulatory scheme shows that the common-sense result must follow: a lender may enforce its rights in New York collateral." *Id.* The regulatory scheme applied primarily to banks maintaining offices within the state in order to protect consumers. *Id.* The *Skylake* court also addressed New York's general statute that prevented a foreign corporation not authorized to do business from bringing suit in the state courts. *Id.* at 932. This law was, on its face, applicable to banks. *Id.* However, New York had a specific statute expressly permitting a foreign bank which obtained a mortgage secured by real property to enforce its rights. *Id.*

The banking laws addressing the conduct and activities of foreign banks do not require foreign banks,

without offices on Guam, to obtain licenses, necessary for broader financial activities, in order to enter loans secured by Guam real property. This transaction is specifically exempted from such licensing requirements under 11 GCA § 106730.

We next address whether a statement of exemption must otherwise be obtained. The Government of Guam, as a policy, requires all businesses to have a business license. 11 GCA § 70130 (1994). If the commercial activity or money-making activity is not required to obtain a business license, the statute then requires a business to obtain a statement of exemption stating no business license is required. 11 GCA § 70130(a). This exemption then can be used in lieu of a business license. *Id.*

If neither a business license nor exception is obtained, a non-complying business's legal recourse is also limited. 11 GCA § 701030. The relevant provisions of the statute state:

> (d) no commercial activity (including operating or leasing of real property) doing business on Guam without a business license may file suit in Guam courts until such time that a business license is obtained. No person engaged in commercial activity without a business license may use the courts to enforce, directly or indirectly, any obligation, lien, or contract incurred during the period of such commercial activity without a business license;
>
> (f) The courts shall liberally construe subsection (b) through (e) of this Section in favor of the landlord or business person and shall ignore technical deficiencies if the courts find there has been substantial compliance with the business

> license laws, rules, and regulations and if the courts find that the landlord or business person has filed on a timely basis (within thirty (30) days of the due date) gross receipts tax returns fully reporting all accountable revenues from the activity concerned for the periods in question;

11 GCA § 70130.

This statute, however, is not applicable to a foreign bank engaging in a transaction listed in 11 GCA § 106730. The purpose of 11 GCA § 70130 is to obtain compliance and collection of gross receipts taxes. 11 GCA § 70130(f) requires a court to "liberally construe subsections (b) through (e) of this Section in favor of . . . the business person and . . . ignore technical deficiencies if the courts find there has been substantial compliance with the business license laws, rules, and regulations and if the courts find that the landlord or business person has filed on a timely basis . . . gross receipts tax returns fully reporting all accountable revenues from the activity concerned for the periods in question. . . . "

However, a foreign bank conducting a transaction pursuant to 11 GCA § 106730 is not subject to gross receipt taxes. A review of 11 GCA § 26202(f) indicates that banks must pay gross receipts tax equaling 4% of the net income received from business. This is calculated by the following:

a. Gross Income of the bank from all sources; less,

b. Salaries or bonuses paid or other compensation; less,

c. Rents paid; less,

d. Interest or discount paid; less,

e. Ordinary operating expenses such as supplies, utility services, insurance premiums other than for life insurance, provided that any deductible insurance expense shall be allowable only to the extent that such a premium is applicable to the tax period against which it is claimed; less,

f. Loans or obligation charged off the books of the bank as losses unless charged against reserves then in existence; less,

g. Losses other than loan losses, such as those occasioned by fire or other casualty, theft, embezzlement, and the like, but only to the extent not covered by insurance proceeds collected; less,

h. Transfers from earnings to reserve for bad debts or other contingencies provided for; less,

i. Miscellaneous direct expenses such as legal, advertising, auditing, and the like; less,

j. Loss on property sold and depreciation on property owned.

11 GCA § 26202(f) (1995).

It is apparent that types of banks required to pay gross receipts taxes would be those located on island including foreign banks licensed pursuant to § 106725. A foreign bank to licensed would be required under 11 GCA § 106724 to keep separate accounting records of assets, liabilities, income, expenses, etc. to enable the determination of the gross receipts tax. Moreover, such a bank maintains accounting records locally that permit the

audit and verification of calculations of gross tax receipts. *Id.*

The statute also requires that the gross tax calculation be based on income from all sources. It is highly unlikely that Guam would undertake the collection of taxes on all income sources of a foreign bank because of its loan secured by mortgage property. Equally difficult to imagine would be allowing a bank such as LTCB to deduct from income all of its worldwide expenses.

Next, 11 GCA § 70130 does not apply to an entity doing business under 11 GCA § 106730 because the purpose of licensing, pursuant to 11 GCA § 70102, is to ensure "that all necessary and reasonable control and regulation thereof may be practiced by the Government of Guam for the protection of the health, safety and morals of the people of Guam." However, as addressed in *Skylake*, these public interest concerns are not implicated by lending of a foreign bank which is secured by in state property. *Skylake*, 559 N.Y.S.2d at 932.

In addition, the legislature included specific language in 11 GCA § 106731, not included in 11 GCA § 106730, that exempts the transaction at issue from the business licensing requirements of 11 GCA § 70130. The language of both statutes state, "Nothing in this Chapter shall prohibit. . . . " foreign corporations from conducting certain transactions. *See id.* However, 11 GCA § 106731 further states: "subject to compliance with any applicable laws of this Territory pertaining to foreign corporations and any other applicable law,. . . . " This language is not present in the mortgage provision of the chapter. Because the legislature enacted these two provisions at the same

time, we must assume an intent by the legislature to insulate a mortgage transaction from other laws, including the licensing laws. 2A *Sutherland Statutory Construction* § 47.23 (Rev. 5th ed. 1992).

As stated earlier, a foreign bank wanting to conduct business specified in 11 GCA § 106727 must obtain both a business license and a foreign corporation license. 11 GCA § 106722(e) (stating that the bank must comply with Title 18 requirements). The conditions for a foreign corporation license are set forth in 18 GCA § 7101.

The business license requirement is set forth in 11 GCA § 106722(i). This statute specifically requires that a commercial license be issued pursuant to 11 GCA § 72102. This provision states:

> Every person engaging in or carrying on business in Guam of banking or receiving the money of others on deposit shall be required annually to obtain a commercial license; provided, however, that in addition to the requirements of this Subchapter, a license shall not be issued to a foreign banking corporation ***unless its application has first been approved by the Banking Board pursuant to 22 [sic] GCA § 106725 [GC § 30924] and the license is in the form prescribed by that Section.***

Thus, it is clear from § 72102, coupled with the language of § 106725 (the Banking Board directs the Licensing Division) (listed above), that a license will be issued only by the Banking Board's authority. The Licensing Division has therefore no discretion in this matter. It must carry out the directives of the Banking Board. Likewise, the Licensing Division has no discretion as to whether to

issue an exemption to a foreign bank. That authority also lies with the Banking Board.

Finally, this Court finds that having to get an exemption in order to make a loan secured by Guam real property is simply not reasonable. When a bank gets the two licenses required under 11 GCA § 106722, it may engage in the transactions set forth in § 106728 and, if the bank qualifies, engage in transactions set forth in §§ 106728 and 106729. The business license does not include the transaction set forth in § 106730, the securing of a mortgage loan with Guam real property. Consequently, because it is not included within the scope of the license, then the foreign bank, licensed here on Guam, would still need to get an exemption under § 70130.

III. Conclusion

Based on the foregoing, we **REVERSE** the judgment of the Superior Court.

/s/ Peter C. Siguenza
PETER C. SIGUENZA
Chief Justice

/s/ Janet Healy Weeks
JANET HEALY WEEKS
Associate Justice

/s/ Jose I. Leon Guerrero
JOSE I. LEON GUERRERO
Associate Justice

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EIE GUAM CORPORATION, Petitioner, v. THE SUPREME COURT OF GUAM, Respondent. THE LONG-TERM CREDIT BANK OF JAPAN, LTD., Real Party in Interest.	No. 98-71416 Supreme Court of Guam No. CVA96-017 ORDER (Filed Oct. 20, 1999)

Before: T.G. NELSON, HAWKINS, and GRABER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

IN THE SUPREME COURT OF GUAM

EIE GUAM CORPORATION, Plaintiff-Appellee, vs. **THE LONG TERM CREDIT BANK, OF JAPAN, LTD., et al.,** Defendant-Appellant,	Supreme Court Case No. **CVA96-017** Superior Court Case No. **CV1190-95**
THE LONG TERM CREDIT BANK, OF JAPAN, LTD., et al., Counterclaimant-Appellant, vs. **EIE GUAM CORPORATION, et al.,** Counterdefendants-Appellees.	**ORDER DENYING PETITION FOR REHEARING** (Filed Nov. 13, '98)

The court hereby **DENIES** the Plaintiff-Appellant's petition for rehearing.

Nonc pro tunc to November 4, 1998.

/s/ Janet Healy Weeks
JANET HEALY WEEKS
Associate Justice

/s/ Peter C. Siguenza
PETER C. SIGUENZA
Chief Justice

IN THE SUPERIOR COURT OF GUAM
TERRITORY OF GUAM

EIE GUAM CORPORATION, Plaintiff, vs. THE LONG-TERM CREDIT BANK OF JAPAN, LTD., et al., Defendants.	CIVIL CASE NO. CV1190-95
THE LONG-TERM CREDIT BANK OF JAPAN, LTD., Counterclaimant, vs. EIE GUAM CORPORATION; et al., Counterdefendants.	DECISION AND ORDER (Filed Aug. 19, 1996)

INTRODUCTION

This matter came before the Court on May 23, 1996, upon the Plaintiff's Motion for Summary Judgment on the inadmissibility of the Defendant's Counterclaims. The Court, after ruling from the bench hereby renders its written decision. Attorneys David Mair and Edward A. Calvo appeared on behalf of the Plaintiff; Attorney G. Patrick Civille represented the Defendant.

BACKGROUND

This suit involves loans made by the Defendant, the Long-Term Credit Bank of Japan, ("LTCB") to the Plaintiff, EIE Guam Corporation, ("EIE"). That LTCB made these loans without a business license is an undisputed fact of tremendous significance. Likewise undisputed is the fact that real property located within the Territory of Guam secured the loans at issue here. Little else amidst the thousands of pages submitted to this Court remains undisputed at this time. However, relative to the instant Motion, further agreement would not matter.

In order to better understand the merits of the Motion at hand, relevant allegations and actions by both parties shall be raised. Particularly, in its Complaint filed with the Superior Court of Guam on August 22, 1995, EIE set forth a claim for: Damages, Declaratory Judgments, Permanent Injunctions and a Demand for a Jury Trial.

Responding to the Complaint, LTCB not only filed an Answer, it Counterclaimed for: Foreclosure of Mortgages, Specific Performance of Mortgages, Declaratory Relief Re: Security Agreement, Specific Performance of Security Agreement, Foreclosure of Security Interests, and Declaratory Relief Re: Power of Sale Regarding Mortgage. At issue is the legal viability of these Counterclaims.

The parties allege the following:

In 1986, LTCB made loans to EIE International Corporation, ("EIE International") the Plaintiff's parent company. The Plaintiff contends most of these loans were short-term and unsecured. With approximately $70 Million of the proceeds from these loans, EIE International

established the Plaintiff, EIE Guam Corporation. EIE International did so intending for the Plaintiff to own, develop, and operate the Hyatt Regency Guam.

In 1992, LTCB made a short-term construction loan to EIE to facilitate EIE's construction and development of the Hyatt. LTCB agreed to lend EIE up to $103 million for this purpose. A promissory note provides evidence of EIE's obligations under the Construction Loan Agreement. A leasehold mortgage in favor of LTCB secures these obligations.

The Construction Note provides that EIE is to make all principal and interest payments to LTCB at its offices in Japan or at such other place as LTCB may from time to time designate in writing. LTCB has never designated any location outside of Japan for payments on the Construction Loan. All interest payments made on the Construction Loan prior to December 1994 were made directly to LTCB in Japan.

At about the same time EIE executed the Construction Mortgage, EIE also executed guarantees of certain loans that LTCB and the other banks had made to EIE International. One of the Guarantees was in favor of LTCB individually, the other two Guarantees were in favor of LTCB as agent for itself and the other banks named therein. The Guarantees, which were denominated in Japanese yen, aggregated approximately $200 million and are secured by mortgages on the Hotel that are lower in priority than the construction Mortgage.

The Construction Loan matured on June 30, 1993. At this point LTCB agreed to provide EIE with a one-year extension until June 1994. In July of 1994, EIE defaulted

on the Construction Loan and the Construction Note. Following this, on August 31, 1994, LTCB agreed not to foreclose on the debts. This Forbearance Agreement granted LTCB a security interest in EIE's deposit accounts, cash, accounts receivable, instruments, contract rights and general intangibles. EIE also executed various letters irrevocably assigning to LTCB all of EIE's interest in its deposit accounts and certain accounts receivable.

Under the Forbearance Agreement, EIE was required to make payments to LTCB at regular intervals. The Agreement also required EIE to forward all monies it earned and received into a deposit account established at LTCB's offices in Tokyo, Japan.

By its own terms, the Forbearance Agreement expired on December 31, 1994. Following the expiration of the Forbearance Agreement, LTCB as well as other banks no longer parties to this suit recorded notices of default and elections to sell with respect to the Guaranty Mortgages and the Construction Mortgage.

According to LTCB's Memorandum of Points and Authorities: LTCB has made demand upon EIE under the Construction Loan and under the Guarantees. No principal payments have been made on the Construction Loan, and no interest payments including the forbearance payment have been made since January 1995. No payments have been made under the Guarantees.

In the past, LTCB has retained the local law firm of Carlsmith, Ball, Wichman, Case & Ichiki to prepare, execute and record documents. These documents pertained to mortgages and related documents on Guam real and

personal property which secured LTCB loans. They are alleged to have been negotiated and executed in Japan.

Furthermore, LTCB claims that it has never maintained any office or place of business on Guam. Similarly, LTCB has never had a local telephone listing or mailing address. However, Mr. William E. Williams signed the mortgages in Guam, as a representative of LTCB for that sole purpose. LTCB maintains that Mr. Williams had no authority to negotiate the loan agreements secured by the mortgages or to negotiate the terms of the mortgages themselves.

In acknowledging that it has made a limited number of loans secured by real property on Guam, LTCB adds that it does not engage in any traditional banking business on Guam. LTCB further claims that it has never actively solicited business on Guam.

For the record, LTCB alleges that in order to avoid the aforementioned contractual obligations, EIE has asserted twenty-three causes of action against it. LTCB denies any wrongdoing and now Counterclaims in an endeavor to recover its loans.

ANALYSIS

Pursuant to Rule 56 (c) of the Guam Rules of Civil Procedure, summary judgment shall be rendered if,

> the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a Motion for Summary Judgment is filed with the Court, it is the initial responsibility of the party seeking Summary Judgment to demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). In this case EIE may adequately fulfill this responsibility by establishing that there is no evidence, "Such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

In turn, LTCB must then "Do more than simply show there is some metaphysical doubt as the material facts." *Matsushita Electrical Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247 (1986).

As both parties have filed their respective Motions and Replies, the Court must now determine if a genuine issue of material fact does indeed exist.

In making this determination, the Court will decide the following issues:

1. What does Guam law require in terms of licensing?
2. Does LTCB meet these requirements?
3. Is failure to meet these requirements fatal to LTCB's Counterclaims?

According to Guam Government Code Section 16027 ("GC §16027") which was added to the Code by Public Law 19-10:

> It is the policy of the Government of Guam that all businesses have business licenses. Therefore:
>
> a) any person engaged in any commercial activity or money making activity which does not require a business license (such as professionals, religious organizations, political candidates, etc.) shall obtain a statement from the Department of Revenue and Taxation indicating the name of the applicant, that no business license is required, and the nature of the activity involved, which may be used in lieu of a business license for the nature of their business for purposes of this section. The term "business license" as used in the section shall include such statements from the Department of Revenue and Taxation that the activity is exempt from the requirement for a business license.

With regard to the first issue, the law is quite clear: All businesses on Guam must have either a business license or an exemption.

In the instant litigation, both parties continue to dispute certain facts of this case. However, upon having several hours of argument and reviewing no less than three thousand pages, the Court finds a few dispositive facts do remain uncontested: The Defendant, LTCB has by its own admission loaned money to the Plaintiff, EIE, and secured such loans with real property located within the territory of Guam.

LTCB readily admits in its pleadings that it did so neither with the benefit of a business license nor under the umbrella of an exemption from the Department of Revenue and Taxation. The second issue therefore must be answered in the negative: LTCB does not possess

either a business license or a statement of exemption as required by Guam law.

The last issue pertains to the viability of LTCB's Counterclaims in light of the previous findings. In *Archbishop of Guam v. G.F.G. Corp.*, Crim.No. 95-00007A (D. Guam App. Div. Oct. 2, 1995). ("*Archbishop*") that Court interpreted §16027. Indeed, it found that the lack of both a business license and a statement of exemption was fatal to the Archbishop's cause of action. Specifically, the Court stated:

> Section 16027 is entitled 'Restrictions of Activities on Persons Without Licenses.' The preface of Section 16027 indicates that 'it is the policy of the Government of Guam that all businesses have business licenses.' Incorporating as we must pursuant to subsection (a), the statement of exemption into the term "business license," it follows that Guam policy contemplates that all businesses have either a business license or a statement of exemption.

Furthermore, the *Archbishop* court interpreted the significance of the statutes's language concerning the requirement of an exemption.

It stated:

> Subsection (a) provides that the statement of exemption, 'may be used in lieu of a business license for the nature of a business for the purposes of this Section.' Such an expression would be meaningless if the statement of exemption or the lack thereof would equally substitute for a business license.

As previously stated, LTCB admits that it has neither a business license nor a statement of exemption. Thus, based upon a plain reading of GC §16027 (d),

> No commercial activity (including operating or leasing of real property) doing business on Guam without a business license may file suit in Guam Courts until such time that a business license is obtained. No person engaged in commercial activity without a business license may use the courts to enforce, directly or indirectly, any obligation, lien or contract incurred during the period of such commercial activity without a business license.

In dismissing LTCB's Counterclaims, the Court relies solely upon a plain statutory reading of Guam Government Code 16027 (a) and (d). Nevertheless, the *Archbishop* case also lends support to this Decision.

Title 18 of the Guam Code Annotated § 7104 ("18 G.C.A. § 7104") further augments the strength of the authority behind the Court's decision. 18 G.C.A. § 7104 provides:

> No foreign corporation or corporation formed, organized, or existing under any laws other than those of Guam shall be permitted to transact business in Guam or maintain by itself or assignee any suit for the recovery of any debt, claim, or demand whatever, unless it shall have the foreign corporation license and certificate of registration prescribed in this Chapter.

Once again, a plain reading of the statute will suffice to defeat the admissibility of LTCB's counterclaims. First of all, it is undisputed that LTCB has been formed, organized, and exists under the laws of Japan. Secondly, the

Court finds that LTCB has in fact transacted business on Guam as evidenced by its loans with EIE. The Court does note, however, that EIE's exhibits submitted to this Court support the notion that LTCB has conducted business on Guam for a substantial amount of time. Regardless, EIE's loans alone are sufficient for this determination.

Perhaps more importantly though, the Court finds that by Counterclaiming LTCB is attempting to maintain by itself a suit for the recovery of a debt. Clearly, LTCB falls under the rubric of §7104. This being the case, 18 G.C.A. §7104 statutorily prohibits LTCB's attempt to maintain a suit in the absence of a foreign corporation license. *Pacific Far East Line, Inc. v. Leon Guerroro*, 1 Guam R. 63 (Mar. 7, 1962) ("*Pacific*").

In the *Pacific* case, the District Court of Guam Appellate Division upheld a summary judgment granted against a foreign corporation that did not have a foreign corporation license pursuant to §7104. This Court, finding no reason to deviate from the decision in *Pacific*, has no alternative but to enforce the penalties of the statue by denying the Counterclaims.

As its principal argument against the application of the previously addressed "door closing" statutes, LTCB asserts that it is entitled to an exemption pursuant to Government Code Section 30928. This court notes that this section of the Code has been recodified as Title 11 of the Guam Code Annotated Section 106730. ("11 GCA §106730").

11 G.C.A. 106730 provides:

> Nothing in this Chapter shall be deemed to prohibit a foreign banking corporation which does

> not maintain an office in this Territory for the transaction of business from making loans in this Territory secured by mortgages on real property or from accepting assignments of mortgages covering real property situated in this Territory.

In its Memorandum of Points and Authorities filed with the Court on November 21, 1995 LTCB's argues that:

> Section 16027 (d) of the Government Code purportedly sets forth the consequences of engaging in commercial activity without first obtaining a business license. When a business license is required, one must be obtained for each location at which business is conducted, *see* Guam Civil Code § 16019, and the application forms require a Guam address. In order to comply with the requirements for obtaining a business license therefore, a foreign bank would have to establish a presence on Guam. By doing so, the bank would thereby lose the benefit conferred by section 30928, [now §106730] which allows only a foreign bank that does *not* maintain an office in Guam to make loans secured by real property without first having to obtain a license. LTCB's Memorandum of Points and Authorities, 15-16.

The Court finds that it is a non sequitur to argue: the requirement of a Guam address as a prerequisite for a business license effectively exempts one from obtaining a business license, merely because one is allowed to transact business on Guam without a local office. This attenuated argument is precisely what LTCB relies upon, however. Indeed, it makes absolutely no sense to even posit that a foreign corporation may do business on

Guam without a business license just so long as it does not occupy an office on island.

LTCB relies heavily on *Sondeno v. Union Commerce Bank*, 71 Cal.App.3d 391; 139 Cal.Rptr.229 (1977) ("*Sondeno*") to support its argument for an exemption. That Court dealt with California's Financial Code §1756 and the effect §1757 had on it. §1756 "specifies the kind of business expressly permitted to foreign corporations" *Sondeno* at 394. §1756 did not expressly permit foreign banking corporations to make loans secured by mortgages on real property.

Section 1757 of California's Financial Code is virtually identical to Guam's GCA §106730. Like Guam's version it states:

> Nothing in this chapter shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this State for the transaction of business from making loans in this State secured by mortgages on real property.

In deciding that case, the *Sondeno* Court bridged the gaps between §1756's lack of an affirmative grant to make loans secured by mortgages on real property and the grant by implication that a foreign corporation could in fact make loans secured by mortgages on real property as per §1757.

Clearly, §1757 like 11 GCA §106730 speaks only of making loans secured by mortgages on real property. It does not say: "Nothing in this chapter shall prohibit a foreign banking corporation from doing business without

a license or exemption." *Sondeno* therefore can be distinguished as irrelevant to the specific issue before this Court.

Assuming arguendo that *Sondeno* was on point, it still is not binding. In the absence of a Guam Appellate decision on point, only decisions of California Appellate Courts made prior to Guam's adoption of California statutes are binding precedent. *Hardina v. Guerrero*, SP 99-79 (Super. Ct. Guam Sept. 11, 1979). Therefore, even assuming that §106730 was adopted from California, §106730 has been Guam law, though codified as GC §30928, since December 11, 1975. Therefore, *Sondeno* being a 1977 decision is not binding.

Upon a plain reading of §106730 this Court can find no explicit grant of exemption from the business license requirements of GC §16027 nor the foreign corporation license requirements of 18 GCA §7104. LTCB also does not possess a statement of exemption. In addition, it is quite clear that LTCB has failed to demonstrate in a convincing fashion that the Court's plain reading of an unambiguous statute is wrong.

Moreover, this Court finds that it is absolutely unnecessary to research the legislative intent of §106703. Under the plain meaning rule,

> The language of the statute is the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its construction.

Monte Vista Lodge v. Guardian Life Ins. Co. of America, 384 F.2d 126, 128 (9th Cir. 1967).

Secondly, this Court once again acknowledges that it is intimately aware of the legislature's intent in enacting §106730, nonetheless. Let there be no mistake, however, regarding the Court's analysis. The basis of this Court's decision rests solely upon a plain reading of the applicable statutes, and the relevant case law nothing less, nor more.

Thus, since there is clear and unambiguous authority that specifically requires a foreign banking corporation to obtain a business license before utilizing the courts of this territory to enforce its loan agreements, the Court finds no reason for this matter to proceed to trial.

CONCLUSION

Based on the foregoing, this Court hereby GRANTS the Plaintiff, EIE Guam Corporation's Motion for Summary Judgment as to the inadmissibility of the Defendant, the Long Term Credit Bank of Japan's Counterclaims. This Court hereby orders that all of the Defendant's Counterclaims be dismissed in their entirety.

SO ORDERED, THIS 19 DAY OF AUGUST, 1996.

/s/ Benjamin J.F. Cruz
Hon. Benjamin J.F. Cruz
Judge, Superior Court
of Guam

IN THE SUPERIOR COURT OF GUAM

EIE GUAM CORPORATION,

Plaintiff,

vs.

THE LONG-TERM CREDIT BANK OF JAPAN, LTD., et al.,

Defendants.

CIVIL CASE NO. CV1190-95

DECISION AND ORDER

(Filed Oct. 13, 1999)

This matter came before the Court on September 23, 1999, on Plaintiff's motion to disqualify the law firm of Sherman and Sterling from the above captioned matter. Cathleen Fisher, Esq., and Eduardo Calvo, Esq., appeared on behalf of the Plaintiff EIEG, Howard Greene, Esq., appeared on behalf of EIEI, and G. Patrick Civille, Esq., and James Talon, Esq., were present for the Defendant. Arguments were presented before the Honorable Joaquin V. E. Manibusan, Jr., who took the matter under advisement at the close of the hearing. After having carefully considered the parties' respective arguments, the Court now issues the following Decision and Order.

BACKGROUND

Plaintiff has brought the present motion pursuant to Model Rule 1.9 of the Rules of Professional Conduct, as well as pursuant to case law on this issue, seeking to have the law firm of Sherman and Sterling disqualified from representing the Defendant in this matter. EIEI has joined

in the motion. The basis for Plaintiff's motion is the fact that Sherman and Sterling has previously represented EIEI, the parent company of Plaintiff EIEG, in a matter which Plaintiff contends is substantially related to pending litigation. Plaintiff thus argues that Sherman and Sterling, as EIEI's prior legal counsel, owes a duty of loyalty and confidentiality to its prior client, and further that it cannot now represent Defendant in a matter adverse to EIEI.

In opposition to the pending motion, the Defendant and Sherman and Sterling contend that disqualification is neither proper nor warranted in this matter. Defendant and Sherman and Sterling (hereinafter Defendant) argue that due to the fact that EIEI and LTCB were jointly represented by Sherman and Sterling (hereinafter S&S), S&S owes no duty of confidentiality or loyalty to EIEI nor to Plaintiff EIEG, as there could have been no expectation of confidentiality. Moreover, the Defendant contends that S&S obtained a waiver from the President of EIEI, waiving any conflicts which might arise from this Joint representation. Defendant further argues that Plaintiff has waived any right to bring a motion to disqualify the firm of S&S due to the fact that it has waited over four years to bring this motion. Finally, the Defendant argues that even assuming Plaintiff's arguments are correct, that there is not a substantial relationship between S&S's prior representation of EIEI and the above captioned litigation, thus disqualification is not warranted.

After having carefully considered all of the parties' respective arguments, as well as all of the documents which have been filed in support of and in opposition to

the pending motion, this Court has reached the conclusion that the motion to disqualify the law firm of Sherman and Sterling must be granted. The following discussion sets forth the Court's rational in this regard.

DISCUSSION

Plaintiff has brought the present motion, seeking to have the law firm of Sherman and Sterling, who represent the Defendant LTCB in this matter, disqualified from further representing Defendant in this matter. In addressing the pending motion, this Court is mindful of the fact that S&S has represented the Defendant since the outset of this litigation; a period of over four years. Thus, the Court has given careful consideration to all of the arguments and documentation which have been presented by both parties herein. After having reviewed the voluminous amount of documents, exhibits and declarations on file, this Court has reluctantly, but confidently, reached the conclusion that Plaintiff's motion to disqualify S&S must be granted.

A. Substantial Relationship Test

It is well settled that the relevant test for disqualification of legal counsel is whether the former representation is "substantially related" to the current representation. *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980). See also *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984); *Otaka, Inc. v. Klein*, 791 P.2d 713 (Haw. 1990); and *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft*, 69 Cal.App.4th 223, 81 Cal.Rptr.2d 425 (1999). Thus, whether or not S&S

should be disqualified from this matter is dependant upon S&S's prior representation of EIEI, and the relationship of this prior representation, if any, to the pending matter.

The issue of what constitutes a "substantial relationship" for the purpose of disqualification motions, has been addressed by many courts and the issue is rather well settled, although the language used by Courts in applying this same test varies somewhat. The Court in *Trone v. Smith,* 621 F.2d at 998 held "[s]ubstantiality is present if the factual contexts of the two representations are similar or related", while the Court in *Schwed v. General Electric Company,* 990 F.Supp. 113, 116 (N.D.N.Y. 1998), set out a slightly higher standard in holding:

> [w]here the "relationship between the issues in the prior and present cases is "patently clear". . . . [or] when the issues involved have been "identical" or "essentially the same" "disqualification is warranted. Citing *Hammond v. Goodyear Tire & Rubber Co.,* 993 F.Supp. 197, 199-200 (N.D.N.Y. 1996). Remaining citations omitted.

Additionally, the Court in *Otaka, Inc. v. Klein,* 791 P.2d at 386, held:

> the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. Citing *T.C. Theater Corp. v. Warner Bros. Pictures,* 113 F.Supp. 265, 268 (S.D.N.Y. 1953). October 5, 1999.

Courts have also held that the burden of proving the present and prior representations are substantially related lies with the party seeking disqualification. *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1028 (5th Cir. 1981). It has also been held that "a catalogue of . . . generalities" does not offer the Court assistance in determining the relationship between the representations, but rather "the Court's inquiry should be on the precise nature of the relationship between the present and former representations." *Id* at 1029.

Moreover, it is well settled that reaching a determination on disqualification matters lies well within the trial Court's discretion. See *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft*, 69 Cal.App.4th 223, 228, 81 Cal.Rptr.2d 425, 428, and *Brooklyn Nay Yard Cogenration Partner, L.P. v. Superior Court*, 60 Cal.App.4th 248, 259, 70 Cal.Rptr.2d 419, 426 (1997). Additionally, it is the duty and responsibility of the court to supervise the conduct of attorneys who appear before it. *Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984) (citations omitted). See also *Trone v. Smith*, 621 F.2d at 999.

Finally, while supervising the conduct of attorneys and protecting confidences of clients/former clients is clearly an important concern of the Court, it is also clear that "motions to disqualify counsel should be viewed with extreme caution since they can be misused as techniques of harassment." *Chemical Waste Management, Inc. v. Sims*, 875 F.Supp. 501, 503 (N.D.Ill. 1995).

Additionally, "[a] disqualification of counsel, while protecting the attorney-client relationship, also serves to

destroy a relationship by depriving a party of representation of their own choosing." *Id* (citing *Comden v. Superior Court*, 20 Cal.3d 906, 145 Cal.Rptr. 9, 16, 576 P.2d 971, 978, cert. denied, 439 U.S. 981, 99 S.Ct. 568 (1978).

Thus it is clear that there are very important competing interests which lie on both sides of a motion to disqualify counsel. On the one hand, the party seeking the disqualification has an interest in protecting client confidences, and on the other hand, the party opposing the disqualification has an interest in retaining counsel of their choice. Therefore, in the present case, both parties have important interests at stake pending the determination of this motion, and this Court is concerned with the interests of both parties, and has considered all of the issues involved herein. Having done so, this court has reached the conclusion that the motion to disqualify S&S must be granted.

After a thorough review of the facts, the arguments and the documents provided both in support of and in opposition to this motion, this court has reached the conclusion that there is, in fact, a substantial relationship between S&S's prior representation of EIEI, and its representation of Defendant in this matter. A discussion of the facts in this regard is necessary in order to ascertain the extent of the relationship between the two representations.

Sometime in 1991, the law firm of Sherman and Sterling, undertook to represent EIEI, the parent corporation

of Plaintiff EIEG.[1] This representation involved the purchasing of hotel properties and assets of the Regent New York Hotel. At this time, it appears that EIEI was attempting to purchase and develop many hotel properties around the world. Sherman and Sterling were apparently advising EIEI on how best to restructure the debt it had incurred with regard to this Regent New York Hotel project (hereinafter the Regent project or Regent debt).

It further appears that Defendant LTCB had provided and was providing financing to EIEI for these undertakings and investments. Moreover, it appears that EIEI had incurred a substantial amount of debt in this regard. Presumably, sometime in 1992, it was determined that actions should be taken to restructure the debt that was related to the Regent project, and Sherman and Sterling represented EIEI in this regard. According to Sherman and Sterling, it also represented Defendant LTCB at this time as the parties were purportedly acting together, cooperating in an attempt to restructure and lower EIEI's debt. Sherman and Sterling contend that the parties were engaged in a joint representation at this time.[2]

From the documents and evidence which have been produced in relation to this motion, it appears that many

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[1] It is unclear exactly when this representation began, as there is no engagement letter which has been produced to date which would provide this information. However, the parties are in agreement that the representation commenced sometime during 1991.

[2] Whether or not a joint representation of both parties existed is an issue which will be addressed later in this discussion. However, the Court finds that whether or not such joint representation existed is not dispositive of this motion.

of EIEI's assets and debt were transferred to HIC, the Hotel Investment Corporation, which was set up in order to assist in this restructuring.[3] HIC was created as a subsidiary of EIEI during the time period that Sherman and Sterling represented EIEI. During the period of this prior representation, EIEI executed many different promissory notes, guarantees, and loan agreements, which relate to the financing it obtained in order to further the Regent project. It is Plaintiff's contention that some of the debts which were incurred by EIEI with regard to the Regent project, are also being imposed on Plaintiff EIEG, through guaranties which are at issue in the above captioned litigation. Thus, on this basis, Plaintiff contends that there is a substantial relationship between the prior representation and this matter. Again, while the Court makes no determination with regard to the validity of these claims, the court must look to see if there is evidence of a connection or relationship between the prior representation of EIEI and the present litigation.

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[3] The Court finds it important to note at this point that many of the allegations contained in the motion to disqualify counsel are also allegations which may be relevant to Plaintiff's ultimate claims herein. While the Court may find certain connections between the past and present representations, nothing the Court says herein should in any manner be taken to mean that the Court has reached conclusions with regard to the validity of Plaintiff's claims as contained in the Complaint. The Court has made no determination with regard to the validity of any claims. Rather the Court is merely reciting facts which assist in demonstrating the relationship between Sherman and Sterling's prior representation of EIEI and its present representation of Defendant LTCB in this matter.

A review of various documents which have been produced in support of this motion do appear to draw a connection from Sherman and Sterling's prior representation of EIEI and the subject matter of the present case. Sherman and Sterling is currently representing LTCB, the bank which provided EIEI financing for the Regent project, and which also provided Plaintiff herein, EIEG, financing for the Hyatt Hotel Guam project, which is what is at issue in the present case. Plaintiff EIEG has sued Defendant LTCB arguing that the loan documents, guarantees, etc. related to the Hyatt Guam project are unenforceable. Thus, in order to find that Sherman and Sterling's prior representation of EIEI is substantially related to its representation of Defendant in this matter, the Court must find something which connects the Regent transactions to the issues involved in the present case. Once such a connection is found and it is determined that there is a substantial relationship between the two representations, the Plaintiff need not prove that counsel had access to confidential information related to the present case, as such is presumed. See *Darmon v. Herzog, Jr.*, 67 F. 3d 211, 214 (9th Cir. 1995) wherein the Court held:

> [t]here is support in the law for the contention that where prior and current representations involve the same transaction, access to confidential information by the attorney in the course of the first representation is presumed. (Citations omitted).

Similarly; "[o]nce a substantial relationship is shown, an irrebutable presumption arises that confidential information was disclosed, and counsel will be disqualified.

Smalley Transportation Company v. Prime Computer, Inc., 137 F.R.D. 397, 398 (1991) (citing *Duncan v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 646 F.2d at 1028). "The ethical obligations inherent in the professional relationship between attorney and client require us to protect against any possibility that this information, if acquired, might be used against the former client." *Trone v. Smith*, 621 F.2d at 1001.

Thus, based upon the foregoing case law, it is evident that once the party seeking the disqualification of counsel has demonstrated that there is, in fact, a substantial relationship between the prior representation and the subject litigation, that it is presumed that counsel obtained or had access to confidential information in the prior representation that may be used in the current matter.

> Where the requisite substantial relationship between the subject of the prior and the current representation can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is presumed and disqualification of the attorney's representation of the second client is mandatory. . . .

Schwed, 1 F. Supp.2d 1050, 1067 (Citing *Flatt v. Superior Court*, 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 885 P.2d 950 (1994).

In order to ascertain whether or not there is, in fact, a substantial relationship between Sherman and Sterling's prior representation of EIEI, and its involvement in the present matter, the Court must first determine what the

period of that representation was. Defendant and Sherman and Sterling have repeatedly asserted that Sherman and Sterling represented EIEI with regard to the restructuring of Regent Assets. It appears that this representation commenced some time in 1991 (see page 34 of the deposition of John Opar), and Sherman and Sterling has stated that it "effectively,"[4] concluded some time in the Spring of 1992. However, a review of relevant documents, herein, indicates to this Court that this representation did not terminate until at least the end of August, 1992. This fact is extremely important with regard to the pending motion, as many of the documents the Court finds evidence a substantial relationship between the former representation and the present case were executed in the summer of 1992, during Sherman and Sterling's representation of EIEI.

In considering the present motion, this Court has carefully reviewed both the declaration of John Opar, a member of the law firm of Sherman and Sterling and one of the lead attorneys on the EIEI representation, as well as his deposition transcript. Mr. Opar states in his declaration dated June 16, 1999, that "Sherman and Sterling effectively ended its representation of EIEI with the transfer of the Regent Hotel assets to HIC in the spring of 1992." Opar declaration at paragraph 7. Thus, this testimony indicates that Sherman and Sterling was involved

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[4] The Court finds it interesting that each time Sherman and Sterling makes reference to the termination of its representation of EIEI, it states that such representation "effectively" ended in the Spring of 1992. The Court finds that the use of the word "effectivcly" indicates that the representation did not, in fact, terminate in Spring of 1992, but rather continued thereafter.

in representing EIEI until the transfer of the Regent Hotel assets to HIC was complete. Mr. Opar later stated in his June 18, 1999, deposition that he believed this restructuring ended in August of 1992. See page 67 Opar deposition. He further stated at pages 68 and 69 of that deposition that Sherman and Sterling's representation of EIEI did not end abruptly, but rather the representation shifted from EIEI to HIC when the assets changed from EIEI to HIC, its subsidiary, thus indicating it was a gradual termination.

Therefore, it appears clear to this Court that Sherman and Sterling's representation of EIEI did not terminate until the restructuring the parties were engaged in ended, and this by Mr. Opar's own testimony, did not occur until August of 1992. Additionally, due to the fact that Sherman and Sterling has been unable or unwilling to produce either an engagement letter or a termination letter indicating exactly what period the EIEI representation spanned, the Court is free to and has no choice but to make its own conclusions with regard to the period of representation, based upon the evidence which was presented herein.

Moreover, according to Mr. Opar, once the assets were transferred from EIEI to HIC, Sherman and Sterling's representation of EIEI terminated, but then a joint representation of LTCB and HIC began. See pages 205-208 of the Opar deposition. The Court finds these facts of import in light of the documents which have been produced in this matter which clearly demonstrate that there is, in fact, a substantial relationship between the prior representation and the present litigation. The three guarantees which are at issue in this litigation, which shall be

discussed below, are all dated July 15, 1992, thus evidencing the fact that they were executed at a time when Sherman and Sterling represented EIEI.

Furthermore, a letter dated June 2, 1992, from Lee Kuntz, another member of the law firm of Sherman and Sterling, to LTCB, provides further relevant information. This letter clearly states that Sherman and Sterling were retained by EIEI, to represent HIC, a newly formed subsidiary of EIEI, in connection with the Regent restructuring project. Thus again, the documents which will be discussed below which indicate that HIC related debt is involved in the present litigation, clearly demonstrate the connection between Sherman and Sterling's prior representation of EIEI and this matter. By Sherman and Sterling's own account as set forth in this letter, EIEI retained Sherman and Sterling to represent EIEI subsidiary HIC in the Regent transactions. Thus, this letter coupled with Opar's previously discussed testimony, indicates that Sherman and Sterling represented EIEI in the Regent transactions. Further it is clear that during this representation, debt was incurred by EIEI, and debt and assets were transferred from EIEI to HIC, a subsidiary that Sherman and Sterling assisted in creating. Moreover, once such transfer was completed – sometime at the end of August 1992 – Sherman and Sterling's representation of EIEI ended and it then commenced representation of HIC, the subsidiary it helped create.

Other documentation which has been briefly referenced in the foregoing discussion further demonstrates the connection or relationship between Sherman and Sterling's prior representation of EIEI and the subject matter of the above captioned litigation. Plaintiff EIEG entered

into various loan agreements with Defendant LTCB which are dated July 15, 1992.[5] These loan agreements relate to the Hyatt Guam project for which Plaintiff EIEG sought and obtained financing from Defendant bank. Included in these three July 15, 1992 construction loan agreements/guarantees are specific references to the fact that EIEI, EIEG's parent, had previously obtained financing from Defendant bank.[6] It is further noteworthy that there is language contained in these agreements which states that plaintiff EIEG is responsible for "any other debt."[7] While this is general and vague language, an inference can be drawn that reference is being made to the debt of Plaintiff's parent EIEI, thus indicating that Plaintiff is guaranteeing debt incurred by EIEI. However, the Court finds that a review of additional documents seems to provide further support for this contention.

The Court next looks to the July 15, 1993, Notice of Default that is served on Plaintiff EIEG. This notice of default, which was executed exactly one year from the

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[5] As was previously noted, Sherman and Sterling represented EIEI during the period from 1991 until August of 1992.

[6] It is clear that the debt incurred by EIEI from LTCB, was incurred at a time when Sherman and Sterling represented EIEI.

[7] The Court also finds it worth noting that in the upper right hand corner of the three construction loan agreements, there is language stating "old money" or "new money". Again, while the Court does not make any determination with regard to the validity of Plaintiff's claims, this language does lend further support to Plaintiffs contention that Plaintiff EIEG is being held responsible for debt incurred by its parent EIEI.

time the Guam guarantees were executed, informs Plaintiff EIEG that EIEI, its parent, is in default on some of its loans, and a letter setting forth a detailed list of EIEI's outstanding loans is attached to this notice. Moreover, this notice of default states that under Section 9.3 of the Plaintiff EIEG's loan agreement, Plaintiff is now in cross default, purportedly under the loan agreements entered into by its parent EIEI, due to EIEI's default. Section 9.3 of the Plaintiff's guarantees states that Plaintiff can be held to be in default under "other" obligations. Thus again, while this language is a bit general and vague in nature, and while this Court is not making a determination on the ultimate issues herein, it finds that such language lends further support for the conclusion that Sherman and sterling's prior representation of EIEI is, in fact, related to the above captioned litigation.

Furthermore, the July 15, 1993 Notice of Default which was sent to the Plaintiff EIEG and which informed Plaintiff that it was in default, also specifically refers to a demand letter which was sent from the Defendant bank to EIEI, informing EIEI that it is overdue on many loans which are set forth in an attachment. Amongst those loans are listed two loans which specifically refer to HIC debt which was purportedly "assumed by EIE-International corporation under the Assumption and Release Agreement dated July 24, 1992", and as was stated previously, Sherman and Sterling represented EIEI during the period of July 1992. Thus, this notice of default provided to the Plaintiff EIEG, also consisted of a demand for payment of debts which were assumed by EIEI from HIC, and it is evident that Sherman and Sterling represented EIEI at the time the HIC debt was assumed by EIEI.

Therefore it appears clear that Defendant is attempting to collect in this matter, on a debt that Sherman and Sterling helped to create during its representation of EIEI. Thus, clearly the prior representation is related to the pending litigation.

Wherefore, the documents referenced herein, give rise to the conclusion that Sherman and Sterling's prior representation of EIEI is, in fact, related to the above captioned litigation. The Plaintiff herein, EIEG, has sued the Defendant bank claiming that loan documents and guarantees the parties entered into with regard to the Hyatt Guam project, are unenforceable; Plaintiff is essentially seeking to void various liabilities of both EIEI and EIEG. Thus the subject matter of this litigation is the Hyatt Guam transactions, and the loan documents and guarantees related to such. However, it does appear that in the Plaintiff's loan documents, there is also reference to EIEI's debt, and as has been set out in the discussion herein, it also appears that part of EIEI's debt has been included in the debt at issue in this matter. Moreover, this debt was clearly incurred during the time period when Sherman and Sterling represented EIEI. Thus, based upon these facts, the Court finds that there is, in fact, a substantial relationship between Sherman and Sterling's prior representation of EIEI, and the subject matter of the present case.

The Court also finds it important to address the fact that there are many claims contained in Plaintiff's Complaint, not all of which appear to be related to Sherman and Sterling's prior representation of EIEI. However, each claim in the Complaint need not be related to the prior representation in order for the substantial relationship

test to be satisfied. Rather, the Court finds that if even one claim or allegation contained in the complaint is the same, similar or substantially related to the prior representation, then this is a sufficient basis upon which to disqualify Sherman and Sterling from this matter. The Court finds that to conclude otherwise would be to encourage parties to file numerous frivolous claims in order to avoid disqualification, by arguing that only one claim is related to the prior representation.

Furthermore, while a review of Plaintiff's complaint herein does not indicate that Plaintiff specifically set forth claims with regard to the Regent project, paragraph 22 of the complaint does clearly state that other loans made to EIEI which have nothing to do with the loans obtained by the Plaintiff herein, were included in the guaranty mortgages. Thus, this allegation as contained in the complaint, coupled with the foregoing apparent connections between Sherman and Sterling's prior representation of EIEI, and the subject of the current litigation, leads to the conclusion that the two matters are, in fact, substantially related. Clearly at issue in this matter is the enforceability of the guarantee documents executed by the Plaintiff herein with regard to the Guam Hyatt project, which also appear to guarantee the unrelated debt of EIEI, Plaintiff's parent corporation.

Additionally, the Court finds very noteworthy the fact that in response to Plaintiff's Complaint, the Defendant's initial and immediate response was to file an Answer and assert Counterclaims against both the Plaintiff and EIEI, Sherman and Sterling's former client. Defendant filed these counterclaims by and through its

counsel, Sherman and Sterling. A review of the counterclaims filed by the Defendant indicates that Defendant is, in fact, attempting in this litigation to collect on debt incurred by EIEI. Paragraph 32 of Defendant's Counterclaim specifically states that "EIEG executed a continuing guaranty, . . . , guaranteeing the obligations of EIEI to LTCB, in connection with the Y2.7 Billion financing." Therefore, it is evident that the Defendant through Sherman and Sterling, is seeking to enforce guarantees against Plaintiff, and one of such guarantees debt that is not related to the Guam debt, but rather is specifically related to "Parent financing"; in other words financing received by EIEI.

Thus, this fact further evidences the relationship between Sherman and Sterling's prior representation of EIEI and the pending litigation. Moreover, it evidences the fact that Sherman and Sterling has undertaken to file suit against its former client, EIEI, in a matter substantially related to its prior representation of that client.

Another related issue which the Court finds noteworthy herein is the fact that earlier in this litigation, Plaintiff filed a motion to bifurcate the issues of liability and damages. Defendant strongly opposed this motion contending that all matters involved in this litigation were closely related, and thus bifurcation of the issues was neither necessary nor proper. Thus, by Defendant's own arguments, all of the issues involved in this litigation are closely related. Therefore Defendant cannot now argue that any reference to EIEI's indebtedness or HIC debt, are really not related to the pending litigation, as the documents previously discussed demonstrate that EIEI's debt is related to this matter.

Wherefore, based upon this finding, it must then be presumed that Sherman and Sterling, an former counsel for EIEI, gained or had access to confidential information from EIEI, which would be relevant in the present case. It is well settled that an attorney cannot use confidences gained from representation of a client against that client in a subsequent matter. Rule 1.9 of the Rules of Professional Conduct provides as follows:

> Rule 1.9 Conflict of Interest : Former Client. A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> > (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
> >
> > (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

The foregoing language evidences the fact that an attorney cannot represent a party in a substantially related matter in which that party's interests are adverse to those of a former client, nor can an attorney use confidential information to the disadvantage of a former client. Based upon these rules of conduct, the law firm of Sherman and Sterling must be disqualified from representing EIEI in the present matter.

The Court has already established that there is a substantial relationship between Sherman and Sterling's

prior representation of EIEI and its representation of Defendant, whose interests are, in fact, adverse to those of EIEI and EIEG. Moreover, as was previously set forth, based upon this substantial relationship, it must be presumed that Sherman and Sterling obtained confidences from EIEI during that representation that may be relevant in the pending matter.

Therefore, having found that there is, in fact, a substantial relationship between the prior representation and the pending litigation, the Court must now address various issues raised by the Defendant with regard to disqualification.

1. **Parent – Subsidiary issue**

In opposing this motion, Defendant has raised several issues with regard to whether or not disqualification herein is proper. Amongst the issues raised by the Defendant is the fact that Sherman and Sterling previously represented EIEI and not Plaintiff EIEG in relation to the Regent project, and thus there is no substantial relationship between the prior representation and the pending litigation. Defendant argues in this regard that only a former client can bring a motion to disqualify counsel. Moreover, Defendant has argued that EIEI, who has joined in EIEG's motion for disqualification, lacks standing to do so. The Court rejects both of the Defendant's arguments in this regard.

The Court is mindful of the case law cited by the Defendant regarding the parent-subsidiary relationship, and its affect on conflict matters. It appears that Courts

have held that for conflict purposes, parent corporations and subsidiaries are to be considered as separate entities. See *Apex Oil Company, Inc. v. Wickland Oil Company*, 1995 WL 293444 (E.D.Cal.), *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft, LLP*, 69 Cal.App.4th 223, 81 Cal.Rptr.2d 425, and *Brooklyn Navy Yard Cogenration Partners v. Superior Court*, 60 Cal.App. 4th 248, 70 Cal.Rptr.2d 419 (1997). The court is further mindful of the fact that these courts have held that the only exception to this general rule is found when the subsidiary is essentially an alter ego of the parent corporation. See *Morrison Knudsen*, 81 Cal.Rptr.2d at 436. However, a review of these cases convinces this Court that such are not applicable in the present case.

The cases cited to by the Defendant regarding the parent-subsidiary issue, deal with the issue of whether counsel can bring suit against one corporate entity while representing the other. See *Brooklyn-Navy Yard v. Superior Court*, 60 Cal.App.4th 248, 250 (1997). This is not the factual scenario which is presently before the Court. Rather, Sherman and Sterling previously represented EIEI, the parent corporation of Plaintiff EIEG. Sherman and Sterling now represents Defendant LTCB against EIEG, the subsidiary. However, the connection between the prior representation and present case does not end here. As has been previously pointed out, debt was incurred by EIEI, the parent corporation at a time when Sherman and Sterling was representing EIEI, in a series of transactions. Sherman and Sterling now represents the Defendant bank in the pending matter, whose interests are directly adverse to those of the Plaintiff, EIEG.

Moreover, it appears that certain guarantees entered into and executed by Plaintiff EIEG also secured debt incurred by EIEI at a time when it was represented by Sherman and Sterling. Thus, this is not simply a case wherein counsel is representing a party adverse to the subsidiary of its prior client the parent. Rather, issues directly involving the debt the parent corporation incurred during its representation by Sherman and Sterling appear to be at issue in this matter. Thus, the Court finds it need not determine whether or not Plaintiff EIEG is an alter ego of its parent EIEI, as the substantial relationship between the prior representation and this matter is evident, therefore the Court need not enter into such discussion.

Furthermore, as Plaintiff has pointed out, a party bringing a disqualification motion need not necessarily be a former client of that counsel. In *Otaka v. Klein*, 791 P.2d at 382-382, the Court held that in order to determine whether disqualification of counsel is proper, the court must "first establish that there was a prior attorney-client *or other* fiduciary relationship. . . . " (Emphasis added). The *Otaka* Court went on to hold that "[a] fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged." *Id.* (Citations omitted). Thus, this language evidences the fact that there is not a strict rule that only a former client who is a party to the action may seek disqualification of counsel to that action. See also *Morrison Knudsen*, 81 Cal.Rptr.2d at 232-233 (wherein the Court held that there is a general proposition that counsel's receipt of confidential information from someone other than a client may, in fact, lead to that

attorney's disqualification); *Kevlik*, 724 F.2d at 847; and *In Re American Airlines, Inc.*, 972 F.2d 605, 611 (5th Cir. 1992). Thus, Defendant's argument that EIEG cannot bring the pending motion as is was not previously a client of S&S, is without merit.

Additionally, even if EIEI were not a party to this matter, which the Court finds it is, as will be discussed below, it would still have the right to bring a motion to disqualify its prior counsel if duties of confidentiality or loyalty were breached. See *Oxford Systems, Inc. v. Cellpro, Inc.*, 45 F.Supp.2d 1055 (W.D. Wash. 1999).

However, having made these findings in the present case, it is important to note that EIEI has joined in the motion to disqualify Sherman and Sterling and it is undisputed that EIEI *was* formerly a client of Sherman and Sterling. Defendant has made much of the fact that EIEI is not a party to this action, and thus has no standing to join in the motion, however this Court finds that EIEI is, in fact, a party to this action by virtue of the six separate counterclaims Defendant has asserted against EIEI. The Court is aware of the fact that such counterclaims were previously dismissed from this action by Judge, now Chief Justice Cruz, however the Guam Supreme Court reversed this decision. Moreover, most recently, this Court has been informed that the Ninth Circuit Court of Appeals has denied certiorari on Plaintiff's appeal of the Supreme Court's ruling. Therefore, it is this Court's opinion that EIEI is, in fact, a party to this action, and it has been made a party by virtue of the counterclaims Defendant has filed against it. Thus, the Court finds that the Defendant is hard pressed to argue

that EIEI is not a party to this action, when it is Defendant's actions herein which have made EIEI a party to this matter.

Thus, the Court finds that Defendant's argument that neither EIEI nor Plaintiff EIEG may bring a motion to disqualify Sherman and Sterling to be without merit.

Finally, the Court finds further support for granting this motion in the fact that the Defendant, LTCB by and through its counsel Sherman and Sterling, has sued EIEI by bringing various counterclaims against EIEI in the above captioned matter which is substantially related to S&S's prior representation of EIEI. The Court finds that such actions violate the duty of loyalty owed to EIEI by Sherman and Sterling as its former counsel.

It is well settled that in addition to the duty of confidentiality an attorney owes to a client/former client, that attorney also owes a duty of loyalty to such client. The Court in *Straub Clinic & Hospital v. Kochi,* 917 p.2d 1284, 1290 (Haw. 1996) held:

> an attorney owes to a former client a duty of loyalty which is breached when the attorney switches sides and begins representing an adverse interest in matters substantially related to the former representation. . . .

Similarly, the Court in *In re Jaeger,* 213 B.R. 578, 587 (C.S.Cal. 1997) held:

> [a]n attorney owes two different duties to a former client. First, the attorney has a duty of confidentiality, which prohibits an attorney

> from using against a former client *any information or knowledge* acquired by virtue of the representation of that client. Second, the attorney has a duty of loyalty to the former client which prohibits the attorney from undertaking a representation adverse to a former client in a matter substantially related to the prior representation of that client.

Emphasis added.

In the present case, this Court has already made a finding that there is a substantial relationship between Sherman and Sterling's representation of EIEI in the Regent transactions, and the subject matter of the pending litigation. Thus, based upon this finding, it must be presumed that Sherman and Sterling gained or had access to confidential information which might be of relevance in the present case. See *Darmon v. Herzog, Jr.*, 67 F.3d at 214.

The Court therefore finds that by representing Defendant in this matter, and more importantly by bringing suit against EIEI by filing the various counterclaims, Sherman and Sterling is violating its duty of loyalty to its former client EIEI by representing Defendant in this matter. Clearly Defendant has interests which are adverse to both EIEI and EIEG, and based upon the finding that the prior representation and the present case are substantially related, it appears clear that Sherman and Sterling cannot continue to represent Defendant in this matter. See Rule 1.7 of the Rules of Professional Conduct which provide; "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client,. . . . "

Defendant and Sherman and Sterling have made many arguments to the effect that no duties owed to EIEI have been violated as a result of Sherman and Sterling's representation of the Defendant herein. However, the Court finds that Sherman and Sterling, by bringing suit against its former client in a matter which is substantially related to its prior representation, constitutes a clear violation of the duties owed to that former client.

Wherefore, based upon the foregoing discussion, the Court shall grant the Plaintiff's motion to disqualify counsel.

B. Waiver and Consent.

As the Court has found that Plaintiff has met its burden in proving that there is, in fact, a substantial relationship between Sherman and Sterling's prior representation of EIEI and the subject matter of the pending litigation, and has further found that the issues raised by the Defendant with regard to the standing issues and lack of relationship between the prior representation and this litigation are without merit, the Court must now address what can be considered the affirmative defenses raised by the Defendant. Defendant first contends that EIEI consented to the alleged joint representation, and further that it waived any possible conflicts that might arise in this regard, by executing the March 31, 1992, waiver letter. The Defendant also argues that even if the Court found that a substantial relationship between Sherman and Sterling's prior representation of EIEI and the present litigation exists, that Plaintiff is not entitled to the relief sought herein based upon laches and waiver resulting from the

delay in bringing this motion. Both issues shall be addressed separately.

1. **Joint Representation of EIEI and LTCB.**

An issue raised by the Defendant and Sherman and Sterling in opposition to the pending motion is that Sherman and Sterling's prior representation of EIEI was a joint representation of EIEI and Defendant LTCB. Thus on this basis, the Defendant contends that there was no duty of confidentiality to EIEI as to LTCB, and thus there is no conflict which arises from its representation of the Defendant in this matter.

In this regard, Defendant has argued that during the time Sherman and Sterling represented EIEI, it had no expectation of confidentiality vis-a-vis LTCB as the two parties were working together in a cooperative effort to reduce or restructure the debt owed by EIEI to LTCB. In support of this position, Defendant has cited to *Christensen v. United States District Court for the Central District of Cal.*, 844 F.2d 694 (9th Cir. 1988) and *Allegaert v. Perot*, 565 F.2d 246 (2nd Cir. 1977), for the proposition that clients involved in a joint representation do not have an expectation of confidentiality with regard to the other, and thus with no expectation of confidentiality, a motion for disqualification is improper.

This Court is mindful of its ruling on Plaintiff's motion for a Protective order, wherein the Court accepted and applied the holdings of *Christensen* and *Allegaert*, however the Court finds that these cases are not dispositive of the issue presently before it. The Court finds that

it is questionable whether or not there was, in fact, a joint representation of EIEI and LTCB by Sherman and Sterling at the time of the Regent transactions. Documents which have recently been produced and provided to the court certainly raise a question as to whether or not Sherman and Sterling represented Defendant during the time of the Regent transactions.

Moreover, assuming there was a representation of Defendant at this time, it is further questionable whether such representation was a joint representation of Defendant along with EIEI. Again, documents have recently been produced which indicate that EIEI was clearly a client of Sherman and Sterling during the period of the Regent project. However, there are also documents which indicate that LTCB was not, in fact, a client at that time. See for example, a memorandum dated January 20, 1992, from Lee Kuntz of Sherman and Sterling to Mr. McLaughlin, wherein Mr. Kuntz states that the firm represents EIEI and that it also represents LTCB in connection with the restructuring of certain debt related to the Regent Hotel. This memorandum specifically states that a "Japanese wall" has been erected between the EIEI and LTCB teams, thus indicating that there was not, in fact, a joint representation of both EIEI and LTCB, but rather indicating that while the firm represented both parties, efforts were made to keep the two representations separate. Nothing in this memorandum indicates that Sherman and Sterling was engaged in a joint representation of both parties herein.

Furthermore, neither Defendant nor Sherman and Sterling could provide the Court or the Plaintiff with a copy of an engagement letter or any other documentation

which would evidence the fact that both the Defendant and EIEI were jointly represented during the same period of time. Rather, not only is there no such evidence or information, there is no letter from either party which would constitute a proper waiver of any conflicts which might arise as a result of the joint representation as is required by the Model Rules. See Rule 1.7. Thus, even if there was a joint representation herein, it appears that EIEI was not properly informed as to the problems inherent in such joint representation, thus it cannot be said that EIEI properly consented to such joint representation as is required. Thus, the Court finds that *Allegaert* and *Christensen* are not on point with the pending matter.

It is well settled pursuant to both Rule 1.7 and 2.2 of the Model Rules that in order for an attorney to jointly represent two parties in the same matter, the client must be fully informed of the implications associated with such representation, and after being so informed, the client must consent to the joint representation. See *In re Scott*, 694 A.2d 732 (R.I. 1997). See also *Terrebonne, Ltd. of Cal. V. Murray*, 1 F.Supp.2d 1050 (E.D.Cal. 1998) (wherein the Court held counsel did not fully or adequately inform the parties of the conflict of interest involved therein.)

In the present case, the Defendant has produced a "waiver letter" dated March 31, 1992, which Defendant contends Plaintiff signed thereby waiving any possible conflicts which might arise with regard to the joint representation. A review of this waiver letter however, indicates that it is inadequate as it does not fully inform EIEI of the conflicts which are inherent in the alleged joint representation. Moreover, it appears that this letter was

executed some time after Sherman and Sterling's representation of EIEI began, and it is clear pursuant to Rules 1.7 and 2.2 of the Model Rules that a client must consent to a conflict prior to an attorney representing him. Thus, a waiver letter which was executed months after the representation began, does not comply with the provisions of these rules.

Additionally, the "waiver letter" which the Defendant produced is very general in nature and it appears that EIEI was not fully informed of the specific nature of conflicts which could arise with regard to the joint representation.[8] Moreover, this letter purports to waive any possible conflict that may arise in the future. Certainly such a general waiver is not sufficient to comply with the requirements set forth in Rules 1.7 and 2.2. It is this Court's opinion that the issuance of a general consent and waiver to any possible conflicts that may arise in the future is not valid. Such a general and prospective waiver evidences the fact that the client has not been fully informed as to the potential conflicts. It is impossible to

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[8] See *Zador Corporation, N.V. v. C.K.Kwan*, 31 Cal.App.4th 1285 (1995) wherein the Court held that a waiver letter which had been presented to one of the parties to the dual representation was sufficient and the party was held to have consented to the dual representation. However, in *Zador*, it is important to note that this waiver letter was provided to the party seeking disqualification at the beginning of the litigation, before counsel's involvement therein. Moreover, the waiver letter in that case was far more detailed and descriptive than the letter at issue in the present case. The Court notes that the waiver letter in *Zador* even addresses the possibility that counsel will be disqualified from representing the parties jointly.

knowingly waive potential and unknown conflicts. without being specifically informed as to the nature of a conflict, a consent or waiver cannot be knowingly made by a client. Moreover, and more importantly, even if this waiver letter were valid, there is no mention made therein regarding the alleged joint representation. Thus, certainly EIEI did not consent to such joint representation as is required by the Model Rules. Therefore, even assuming there was a joint representation of the parties herein, the Court finds that such was not proper as EIEI did not consent thereto.

Finally in this regard, the Court finds it important to also note that the Plaintiff contends that the March 31, 1992 waiver letter was actually drafted by Sherman and Sterling and provided to Mr. Takashi, the President of EIEI, for his signature. Furthermore, neither Defendants nor Sherman and Sterling have disputed this contention. Thus, the fact that this waiver letter was not even drafted by EIEI further calls into question whether EIEI made a knowing waiver to the inherent conflicts herein. While Plaintiff acknowledges the fact that it has no specific memory of executing this waiver letter, Plaintiff contends that the most likely scenario is that Sherman and Sterling or a seconded LTCB employee placed documents in front of Mr. Takahashi for his signature, and that he signed this waiver letter, without being fully informed of the contents or import of that document.

Additionally, it is also noteworthy that this very same waiver letter, containing identical language, was purportedly written to Nagashima & Ohno, a Japanese law firm who also did work for EIEI during this time period. The date on this second, but identical, waiver

letter is January 17, 1992. Thus, these facts certainly render this waiver letter highly suspect and questionable.

Wherefore, based upon these facts, as well as based upon this court's finding that the waiver letter at issue here does not constitute a valid waiver of EIEI's rights with regard to the representation, the Court is lead to conclude that even if there were a joint representation of both parties herein, such was not proper. Thus the argument that due to the joint representation there is no danger that confidences will be violated, is without merit, as is Defendant's argument that EIEI consented to any potential conflicts which might arise with regard to this representation, and thus has waived the right to seek disqualification herein.

2. Waiver Based Upon Laches and Delay

Defendant has also argued that Plaintiff's motion for disqualification should be denied based upon the doctrine of laches. Defendant contends that Plaintiff was not timely in bringing the present motion, and thus Plaintiff has effectively waived its right to seek disqualification herein.

Upon a review of authorities cited by the Defendant, it appears that it is well settled that a party can be held to have waived its right to seek disqualification of counsel if that party has failed to make a timely objection in this regard. See *Schwed v. General Electric Company,* 990 F.Supp. 113, 117 (N.D.N.Y. 1998) (wherein the Court held generally an attorney cannot rely upon laches to protect it from disqualification, however in cases of extreme delay,

a motion to disqualify may be denied based upon laches.) See also *Commonwealth Insurance Company v. Graphix Hot Line, Inc.*, 808 F.Supp. 1200, 1207 (E.D.Pa. 1992) (where the Court indicated motions to disqualify have been denied where the motion is brought years after the conflict arose); *Trust Corporation of Montana v. Piper Aircraft Corporation*, 701 F.2d 85, 87 (9th Cir. 1995) (where the Court held that a client who is entitled to seek disqualification of counsel, but who knowingly refrains from raising the conflict, is deemed to have waived the right); and *Chemical Waste Management, Inc. v. Sims*, 875 F.Supp. 501, 504 (N.D.Ill. 1995) (where the Court held that waiver is a valid basis for the denial of a motion to disqualify).

However, upon a review of the foregoing authorities, it also appears to be well settled that in order for a party to waive its right to seek disqualification, that party must do so knowingly. The Court in *Commonwealth Insurance Company*, 808 F.Supp. at 1207, held:

> [s]uch a finding is justified either when a former client expressly agrees to the attorney's representation of an adversary . . . or when a former client was concededly aware of the former attorney's representation of an adversary but failed to raise an objection promptly when he had the opportunity.

(Citing *INA Underwriters Insurance Co. v. Nalibotsky*, 594 F.Supp. 1199, 1204 (E.D.Pa. 1984)). This Court went on to hold that certain factors must be taken into consideration when determining whether the party seeking disqualification has waived its right thereto. These factors include the length of the delay in bringing the disqualification motion; when the moving party learned of the

conflict; whether the moving party was represented by counsel during the period of the delay; why the delay occurred; and whether the non-moving party will be prejudiced.

In the present case, the Defendant contends that Plaintiff has known about Sherman and Sterling's representation of EIEI since it was undertaken back in 1992. The above captioned litigation was filed in 1995, and it is now the end of 1999, only a few months prior to the scheduled trial date herein. Thus, Defendant contends that Plaintiff has waived its right to seek disqualification of Sherman and Sterling based upon the undue delay in bringing the motion. The Court recognizes the fact that this litigation has been ongoing for a period over four years, and the Court is further mindful of the fact that trial is set to commence in less than four months. Moreover, the Court notes that EIEI has been represented by separate counsel throughout this matter. The Court finds these factors troubling, and the Court has reached its decision to grant the motion for disqualification with reluctance due in part, to this late in the game motion. However, having said that, the Court finds that despite the delay in Plaintiff seeking the disqualification, the Court cannot deny the motion on this basis.

As was previously discussed, in all of the cases Defendant cited wherein waiver based upon the delay in filing a disqualification motion have been addressed; the Courts held that the party seeking disqualification must have *knowingly* refrained from asserting the right to seek disqualification. See *Trust Corporation*, 701 F.2d at 87; *Commonwealth Insurance*, 808 F.Supp. at 1207; and *Chemical Waste Management*, 875 F.Supp. at 504. Thus, in order

to raise the laches or waiver issue, Defendant herein must demonstrate that Plaintiff was aware of the conflicts herein, and failed to raise such issues in a timely manner.

In the present case, the Defendant contends that Plaintiff knew of Sherman and Sterling's representation of EIEI since the outset of this litigation. Moreover, Defendant has cited to several documents which do indicate that employees such as the President of EIEI and EIEG knew that Sherman and Sterling previously represented it, and Plaintiff has admitted that EIEI may have been aware of the engagement of Sherman and Sterling by EIEI Secondees. Further, Defendant has cited to deposition excerpts from depositions of Mr. Takahashi and Mr. Oba (officers of EIEI) which indicate that during their depositions, these men stated they had no knowledge of Sherman and Sterling's representation of EIEI, however documents later produced indicate that both these men did, in fact, know about the representation.

In response to Defendant's allegations in this regard, the Plaintiff acknowledges that while some of EIEI's employees who were seconded employees of LTCB may have known about the nature and extend of Sherman and Sterling's representation of EIEI, no one at EIEI knew the subject matter or details of this representation. Plaintiff further argues that by the time this litigation was initiated in 1995, the seconded employees from LTCB were no longer working with EIEI, and further that many documents were destroyed prior to their departure from EIEI. Thus, EIEI contends that it was not until recent discovery produced documents giving rise to the present motion that Plaintiff became aware of the extent and nature of Sherman and Sterling's representation herein.

Plaintiff further contends that as soon as it obtained information causing it to believe that there might be a conflict in this matter, it promptly sought relief from this Court by first seeking a motion for a protective order, and further seeking an order from this Court directing Sherman and Sterling to produce EIEI's files from that representation to Plaintiff. Shortly after this motion was decided by this Court, Plaintiff filed the motion to disqualify Sherman and Sterling which is at issue. Thus, Plaintiff argues that it did seek disqualification of Sherman and Sterling in a timely manner, as both motions were filed within a few months of Plaintiff learning about the nature and extent of the representation.

After a review of both parties' arguments in this regard, the Court finds that the Plaintiff did not waive its right to bring the pending disqualification motion due to the delay in filing the motion. While the Court is mindful of the fact that over four years have passed since this litigation was commenced, it does appear from the documents which have been filed in support of this motion that the Plaintiff only recently learned of the full extent of Sherman and Sterling's prior representation of EIEI. Moreover, it cannot be said that Plaintiff failed to act when it did obtain information regarding this prior representation, as over the past several months Plaintiff has filed the motion for a protective order and the current motion seeking disqualification. The Plaintiff has additionally sought discovery on the issue of the former representation, has sought production of EIEI's files from S&S, and Plaintiff also briefly refused to continue the discovery process until such time as this issue was addressed by the Court. Thus it is evident that once

Plaintiff obtained the information regarding the prior representation which serves as the basis for this motion, the Plaintiff took actions to pursue this issue.

Moreover, the Court finds it extremely important to note the fact that Sherman and Sterling did not come forward at the outset of this litigation and disclose the potential conflict to Plaintiff nor to this Court. Rather, Sherman, and Sterling sat silent for over four years. The Court finds that had Sherman and Sterling come forward at the outset and raised the issue of this potential conflict and had Plaintiff thereafter failed to seek disqualification, in that instance Defendant's argument that Plaintiff waived its right to raise this issue would be much more convincing. However, the fact that Sherman and Sterling failed to inform Plaintiff of the potential conflict further convinces this Court that disqualification is necessary.

As Courts from various jurisdictions have held, if the potential conflict is raised by counsel, it permits the party seeking disqualification to review the record and determine early on in the litigation whether or not it should move for disqualification. See *Schwed*, 990 F.Supp. at 117. Similarly, the Court in *Baird v. Hilton Hotel Corp.*, 771 F.Supp. 24, 28 (E.D.N.Y. 1991), held that while the party whose counsel was sought to be disqualified from that matter will certainly suffer some prejudice as a result of the disqualification, "the prejudice has been, to a great extent, the result of the failure of the Katz firm to formally notify the defendants of the potential conflict." The Court in *Schwed* essentially adopted the *Baird* Court's rationale and granted the motion for disqualification despite the fact that ten months had passed prior to the

disqualification motion being brought. The Court in *Schwed* held:

> [a]ny prejudice to plaintiffs, conflicts of interest, or grounds for disqualification could have been avoided or certainly lessened if appropriate steps had been taken by the McNamee Firm at the time it was considering employing Grygiel as "of counsel."

Schwed, 990 F.Supp. at 117. See also *Terrebonne, Ltd.*, 1 F.Supp. 1050 (E.D.Cal. 1998).

Indeed, in the few cases where the Courts denied motions to disqualify counsel based upon a claim of laches or delay, the Courts all made specific findings that the party seeking disqualification knew of the facts relied upon in support of the disqualification motion, and did not timely act on such facts. See *Commonwealth Insurance*, 808 F.Supp. at 1207. See also *Trust Corporation of Montana*, 701 F.2d at 87 (wherein the Court made a specific finding that the party seeking disqualification had known of the opposing firm's prior representation for a period of over two years and six months, and further, that party had informed opposing counsel that it would contact it if there were any objections in that regard.)

Thus, in the present case, the Court finds that Sherman and Sterling's failure to make a disclosure and raise the issue of its prior representation of EIEI at the outset of this litigation defeats its argument that Plaintiff's motion must be denied on the basis of laches. Had Counsel made such a disclosure at the outset of this litigation, it would be in a much better position to make the laches argument. However, Sherman and Sterling chose to sit silently as this litigation proceeded over the years, and thus it can be

said that any prejudice Defendant will suffer herein as a result of the disqualification could have been avoided had its Counsel been forthcoming. See *Schwed*, 990 F.Supp. at 117.

Counsel's actions in this matter have contributed to, if not caused, its disqualification from this matter at such a late time in this litigation. The court finds that had Sherman and Sterling complied with the Model Rules' requirements and disclosed the issue of the potential conflict back when the Complaint herein was filed and served upon Defendant, neither the Court nor the parties would be forced to address this issue at such a late date.

Wherefore, based upon the foregoing discussion, the Court finds that while laches and delay are valid considerations when determining whether or not to disqualify counsel, such doctrines are not available to Counsel in this matter, and thus the motion to disqualify must be granted.

C. Prejudice to Defendant.

The last issue the Court must address with regard to the pending motion for disqualification, is the prejudice that will be suffered by the Defendant, if the motion to disqualify is granted. Prejudice to the non-moving party is an issue which the Court must consider when there has been a delay in bringing a motion to disqualify, and thus where the issue of waiver may be implicated. See *Employers Insurance of Wasau*, 692 F.Supp. 1150 at 1165.

It is well settled that a disqualification motion, if granted, will certainly work some hardship on the party

whose counsel is disqualified. This is especially so if there has been a significant delay in bringing the motion to disqualify. However, it is also evident that the Court has an interest in protecting the integrity of the legal profession, and in preventing counsel from exploiting unfair advantages they may have over their former client.

> Motions to disqualify counsel present competing policy considerations. On the one hand, a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court. (Citations omitted). On the other hand, it must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement.

Zador Corporation, N.V. v. C.K.Kwan, 31 Cal.App.4th 1285, 1302 (1995).

In the present case, clearly the Defendant will be prejudiced if Sherman and Sterling is disqualified from representing it in this matter. This litigation has spanned a period of over four years; the parties have engaged in extensive discovery and motion practice; the subject matter of this litigation is somewhat complex; and the trial herein is currently scheduled to commence in less than four months. However, despite these facts, and despite the fact that the Defendant will, indeed, be prejudiced, the Court finds that it must grant the motion to disqualify counsel. In the present case, the Court finds that any prejudice suffered by the Defendant will be outweighed

by the Court's need to uphold and preserve high ethical standards of this profession.

> We are not unmindful of the possible hardship our decision may impose upon the trustee estate. The burden on both the trustee and the court is bound to be substantial. And we recognize our responsibility to preserve a balance between plaintiff's right to their own freely chosen counsel and the profession's need to preserve the highest ethical standards. (Citations omitted).

Trone, 621 F.2d 994 at 1001. See also *Kevlik*, 724 F.2d 844 at 848 (wherein the Court held "[i]n any event, the need for upholding high ethical standards in the legal profession far outweighs the problems caused by the delay in filing the disqualification motion.")

Additionally, as was discussed in the foregoing section of this discussion, much of the prejudice to the Defendant could have been avoided had Sherman and Sterling been forthcoming at the outset of this litigation by raising the issue of the potential conflict. As the Courts in *Straub*, 917 P.2d 1284 at 1291 and *Baird*, 771 F.Supp. 24 at 28, held, any prejudice suffered by counsel and by the non-moving party (in this matter the Defendant) has, in large part, been brought upon themselves.

> Moreover, although undoubtedly a plaintiff suffers some prejudice whenever his counsel is disqualified on the eve of trial, the prejudice has been, to a great extent, the result of the failure of the Katz firm to formally notify the defendants of the potential conflict.

Baird, 771 F.Supp at 28.

Thus, in the present case, had Sherman and Sterling made a disclosure at the outset of this litigation regarding its prior representation of EIEI, this matter may have been addressed much earlier in these proceedings and the prejudice to the Defendant would have been significantly lessened. However, the Court cannot ignore the conflict which exists in Sherman and Sterling's representation of the Defendant in this matter, despite the prejudice that Defendant will suffer.

The Court does note with regard to the issue of prejudice that Sherman and Sterling is not Defendant's only counsel in this matter, rather Defendant has retained at least one other law firm to represent it herein. Thus while clearly the Defendant will suffer some prejudice as a result of this disqualification, Defendant will not be left with no counsel at all.

Furthermore, as the Court recognizes the Defendant's need to assess this situation in light of the Court's ruling, and to retain new counsel to replace Sherman and Sterling, the Court shall vacate the trial date which is currently set for January 10, 2000. The Court is mindful of the fact that Sherman and Sterling has worked on this matter for over four years and that much investigation, discovery and motion practice has been conducted. Thus certainly any new counsel engaged by the Defendant will need a significant amount of time to review the extensive files herein, to familiarize itself with the matters at issue, and to prepare for trial, and the Court is not insensitive to this fact. Thus, the Court shall vacate the trial date which is currently set, and the issue of a new trial date shall be addressed when the Defendant has retained new counsel

and when this counsel has had the opportunity to sufficiently familiarize itself with this matter. In vacating this trial date, the Court is also mindful of the Plaintiff's desire to proceed with the scheduled trial date, however Plaintiff cannot have it both ways. Plaintiff instituted the present motion, and thus Plaintiff cannot now complain that the trial date will be delayed.

CONCLUSION

Wherefore, based upon the foregoing discussion, the Court reluctantly but confidently finds that Plaintiff's motion to disqualify Sherman and Sterling from this matter must be granted. The Court has carefully reviewed all of the briefs as well as the documents which have been provided to the Court both in support of and in opposition to the pending motion, and having done so, it is evident chat there is, in fact, a substantial relationship between Sherman and Sterling's prior representation of EIEI with regard to the Regent transactions, and the present case. As the Court discussed, it appears that debt incurred by EIEI, Plaintiff's parent corporation, during the Regent transactions, is also at issue in the present case, as the guarantees indicate that Plaintiff EIEG is being held responsible for loans made by LTCB to HIC and assumed by EIEI. Moreover, it further appears that the very guarantees which are at issue in this matter were drafted and executed at a time when Sherman and Sterling represented EIEI. The Court cannot ignore the apparent connection in this matter and allow Sherman and Sterling to proceed as counsel for the Defendant herein. To do so would be to allow Sherman and Sterling an unfair advantage over the Plaintiff, and would further

violate our rules of professional conduct. Thus, the Court shall grant the motion to disqualify.

The Court reaches this decision reluctantly, due in part because of the respect it has for Sherman and Sterling, who has a respectable reputation within the legal community, but also because this Court is mindful of the extensive amount of work and effort Sherman and Sterling has put into this matter over the last four years on behalf of the Defendant. The Court is further distressed in reaching this conclusion due to the fact that this hardship could likely had been avoided had a disclosure been made at the outset of this litigation. See *Schwed*, 990 F.Supp. 113 at 118. However, despite the Court's reluctance in granting the pending motion, it finds that based upon the applicable law and the particular facts of this case, that the motion to disqualify must be granted.

These are the findings of this Court.

SO ORDERED this 13th Day of October, 1999.

/s/ Joaquin V. E. Manibusan, Jr.
Joaquin V. E. Manibusan, Jr.
Judge, Superior Court of Guam

The All Writs Act 28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary where appropriate in aid of their respective jurisdiction and agreeable to the uses and principles of law.

48 U.S.C. § 1424-2. Relations between courts of United States and courts of Guam; review by United States Court of Appeals for Ninth Circuit; reports to Congress; rules

The relations between the courts established by the Constitution of laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: *Provided,* That for the first fifteen years following the establishment of the appellate court authorized by section 1424-1(a) of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have

jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.[1]

(Aug. 1, 1950, c. 512, § 22B, as added Oct. 5, 1984, Pub.L. 98-454, Title VIII, § 801, 98 Stat. 1742.)

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[1] So in original. Probably should be "section".

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
CIRCUIT RULE 6-2
PETITION FOR WRIT OF CERTIORARI
TO REVIEW FINAL DECISIONS OF THE
SUPREME COURT OF GUAM

(a) Petition of Writ of Certiorari

(1) A review of final decisions of the Supreme Court of Guam may be sought pursuant to 48 U.S.C. § 1424-2 by filing a petition for a writ of certiorari with the Clerk of the Court of Appeals within 40 days from the entry of the final decision of the Supreme Court of Guam in both civil and criminal cases. Petitioner shall pay $100.00 docketing fees to the Clerk of Court of Appeals. Petitioner shall serve one copy of the petition for a writ of certiorari on each of the parties to the proceedings in the Supreme Court of Guam.

(2) A cross-petition for a writ of certiorari may be filed within 21 days after the first petition was filed, or within 42 days from the entry of the Supreme Court of Guam's final decision, whichever is longer.

(3) If a timely petition for rehearing of the final decision of the Supreme Court of Guam is filed pursuant to the Rules of the Appellate Procedure of the Supreme Court of Guam, the time for filing the petition for a writ of certiorari shall run from the entry of the order denying the petition.

(b) Content of Petition. The petition for a writ of certiorari shall contain, in the order indicated:

(1) A table of contents and a table of authorities;

(2) A statement of the basis of jurisdiction of this Court, showing the date on which the judgment sought to be reviewed was entered, the date of any order respecting rehearing, and, in the case of a cross-petition for a writ of certiorari, the date of filing the petition for a writ of certiorari with which the cross-petition is filed;

(3) Questions presented for review, expressed concisely in relation to the circumstances of the case;

(4) A statement of the case summarizing the proceeding and the opinion of the Supreme Court of Guam, and setting out the facts material to the consideration of the question(s) presented;

(5) An argument amplifying the reasons relied upon for allowance of the writ;

(6) a short conclusion;

(7) An appendix, containing the final decision of the Supreme Court of Guam; any other opinions, orders, findings of fact, and conclusions of law entered by the Supreme Court of Guam; statutes, rules, and regulations involved; and a list of all parties to the proceedings in the Supreme Court of Guam.

(c) Response. Within 21 days after service of the petition for a writ of certiorari, an adversary party may file a response. All parties to the proceedings in the Supreme Court of Guam are deemed parties entitled to file a response in the Court of Appeals, unless the petitioner notifies the Clerk of the Court of Appeals in writing of the petitioner's belief that one or more of the parties in the Supreme Court of Guam have no interest in

the outcome of the petition. No further memorandum may be filed, except with leave of court.

(d) Format and Length

(1) The typeface, page size, margins, line space, and text style of a petition for a writ of certiorari and response(s) to the petition must be in compliance with Ninth Circuit Rule 32(b), (c) and (d).

(2)

(i) A proportionately spaced petition for a writ of certiorari and response must not exceed 5,600 words, and may not have an average of more than 280 words per page, including footnotes and quotations.

(ii) A petition for a writ of certiorari and the response to the petition must be accompanied by a certificate of compliance which states that the petition or the response conforms to the format noted at (d)(1) and word count noted at (d)(2)(i) or (d)(2)(ii).

(3) The word count and page limits under sub-paragraph (2)(i) and (2)(ii) do not include the table of contents, table of authorities, and appendix.

(4) The petition for a writ of certiorari and response(s) must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open. The cover of a petition for a writ of certiorari should be white; that of the response(s), cream.

(e) Copies. Parties shall file an original and four (4) copies of the petition for a writ of certiorari response(s) to the petition, and any supporting papers and appendices.

(f) Disposition of the Petition. The petition and any responses(s) shall be referred to a motions panel for disposition. If a petition for a writ of certiorari is granted, the case will be scheduled for briefing and oral argument, if necessary.

(g) The Record on Review. The record on review shall consist of the record presented to the Supreme Court of Guam, and a certified copy of the docket entries prepared by the Clerk of the Supreme Court of Guam.

(h) The Certificate of Record. When the record is completed, the Clerk of the Supreme Court of Guam shall file a certificate of record with the Clerk of the Court of Appeals. The certificate shall attest that all documents which comprise the record on appeal are available for the parties in the office of the Clerk of the Supreme Court of Superior Court of Guam. The filing of the certificate of record with the Court of Appeals shall indicate that the Court of Appeals considers the record filed.

(NEW RULE 7/1/98)

GUAM CODE ANNOTATED

TITLE 11

DIVISION 3

BUSINESS LICENSE LAW

CHAPTER 70

GENERAL PROVISIONS

§ 70101. Title.

§ 70102. Purpose.

§ 70103. Definitions.

§ 70104. Administration.

§ 70105. Duties of Licensing Division.

§ 70106. Qualifications.

§ 70107. Rules and regulations.

§ 70108. Same: not retroactive.

§ 70109. Examination.

§ 70110. Prerequisites.

§ 70111. Inspections.

§ 70112. License Board.

§ 70113. Review of applications.

§ 70114. Same: review of order to suspend or revoke license.

§ 70115. Term of license.

§ 70116. Apportionment of fees.

§ 70117. Renewal.

§ 70118. Licenses not transferable.

§ 70119. Misdemeanor.

§ 70120. Suspension and revocation of license.

§ 70121. Two or more business locations operated by one person.

§ 70122. Classification of business.

§ 70123. Combination businesses.

§ 70124. Effective date of license.

§ 70125. Separability.

§ 70126. Exemptions.

§ 70127. Alien labor.

§ 70128. Employment Discrimination.

§ 70129. Enforcement Power.

§ 70130. Restriction of Activities on Persons Without Licenses.

§ 70131. Closing of Business of Person Without Business License.

§ 70132. Clearance Necessary that Taxes Due are Paid to Obtain Business License.

* * *

§ 70103. Definitions. For the purposes of this Division, except as otherwise specifically provided, the following words and phrases, together with all the common derivatives thereof, (i.e., verbs, plurals, gerunds, etc.) shall have the meaning prescribed in this section:

(a) *Applicant* shall mean and include any person who files formal written application in the prescribed form, for any license as herein provided, with the Licensing Division of the Department of Revenue & Taxation of the Government of Guam.

(b) *Board* shall mean and include the License Board appointed under authority of this Division.

(c) *Business* shall mean and include any activity or conduct (whether proprietary, partnership, corporate, or whatever form) engaged in, or caused to be engaged in, with the object of gain or economic benefit, either direct or indirect, but shall not include casual sales, personal service contracts or fund raising activities by political candidates, committees, parties, corporations, associations, organizations or funds. No political candidate, committee, party, corporation, association, organization or fund shall be required to register with the Department of Revenue and Taxation or be required to obtain a business license.

* * *

(h) *License* shall mean and include the permission granted by the Government of Guam, under the authority of this Division, conferring upon the licensee the right to engage in a business or to practice a trade or a profession which without such authorization and permission would be illegal; it shall also, when the context so requires, mean and include the written evidence of such permission.

(i) *License Fee* means the charge or assessment levied by law for the privilege or authority to do that which, without payment for and obtaining such privilege or authority, would be illegal under the provisions of this Division.

(j) *License Division* shall mean that Division of the Department of Revenue & Taxation of the

Government of Guam charged with the responsibility and duty of administering this Division, and *Chief* of such Division shall mean the person who is in charge of the License Division, by direction of the Director of Revenue & Taxation.

(l) *Person* means and includes any individual firm, copartnership, joint venture, association, corporation, estate, trust, or other group or combination acting as a unit.

* * *

§ 70110. Prerequisites. Prerequisites to and qualification for the obtaining of any license hereunder shall be mandatory, whether provided by law, rule or regulation and may be changed, from time to time by the Licensing Board as it deems necessary and proper; provided, however, that in no case shall a change be deemed to be retroactive and all such prerequisites and qualifications must be within the scope of that which is provided by law.

* * *

§ 70119. Misdemeanor. Any person who is required by the terms of this Division to obtain a license or licenses, and endorsements applicable thereto, and who refuses or fails to obtain such license or licenses, and endorsements, shall be guilty of a misdemeanor.

* * *

§ 70126. Exemptions. The provisions of this Division, and the license requirements thereunder, shall not apply to the following activities:

(a) Any business or trade engaged in or conducted by the Government of Guam, or the

Government of the United States, or for the sole and direct benefit of or under the direct supervision of the Government of Guam.

(b) The selling or marketing by a Guam agricultural producer of his own farm produce in its natural state.

* * *

§ 70130. Restriction of Activities on Persons Without Licenses. It is the policy of the government of Guam that all businesses have business licenses. Therefore:

(a) any person engaged in any commercial activity or money-making activity which does not require a business license (such as professionals, religious organizations, political candidates, etc.) shall obtain a statement from the Department of Revenue and Taxation indicating the name of the applicant, that no business license is required, and the nature of the activity involved, which may be used in lieu of a business license for the nature of their business for purposes of this Section. The term "business license" as used in this Section shall include such statements from the Department of Revenue and Taxation that the activity is exempt from the requirement for a business license;

(b) no lease of real property may be recorded without a copy of the current business license of the Landlord (lessor) attached;

* * *

(d) no commercial activity (including operating or leasing of real property) doing business on Guam without a business license may file suit in Guam courts until such time that a business license is obtained. No person engaged in

commercial activity without a business license may use the courts to enforce, directly or indirectly, any obligation, lien, or contract incurred during the period of such commercial activity without a business license;

* * *

(f) The courts shall liberally construe subsections (b) through (e) of this Section in favor of the landlord or business person and shall ignore technical deficiencies if the courts find there has been substantial compliance with the business license laws, rules, and regulations and if the courts find that the landlord or business person has filed on a timely basis (within thirty (30) days of the due date) gross receipts tax returns fully reporting all accountable revenues from the activity concerned for the periods in question;

(g) In any civil action, the failure of one party to have a business license shall be an affirmative defense by any other party. Once the person raising the defense establishes that there is or was no business license at the relevant time, the burden of proof shall be upon the person without a license to establish that the provisions of this Section do not act as a bar to his or her claim or cause of action;

(h) This Section shall be effective January 31, 1988. This Section does not apply to causes of action, acts, or omissions arising before January 31, 1988.

§ 70131. Closing of Business of Person Without Business License. Any person doing business within the Territory of Guam which is otherwise required by law to

have a current business license but does not have one shall be closed promptly by the Department of Revenue & Taxation, after a hearing pursuant to the Administrative Adjudication Law, until all required returns are filed and all taxes paid or arrangements are made to pay them. All assets of the person or corporation shall be frozen after such hearing until all required tax returns are submitted to the Department of Revenue & Taxation, all taxes are paid or payment arrangements are made, and a valid business license is obtained.

§ 70132. Clearance Necessary that Taxes Due are Paid to Obtain Business License. No person may obtain or renew a business license without clearance from the Director of Revenue & Taxation that all income tax returns, gross receipts tax returns and withholding tax returns which are due from that person have been filed (or an extension has been approved or granted thereon by the Director of Revenue & Taxation, which extension has not expired), and that all taxes due thereon have been paid or arrangements have been made with the Director for payment thereon and such arrangements are current.

GUAM CODE ANNOTATED

TITLE 11

DIVISION 2

TAXES

CHAPTER 35

AMERICAN INVESTORS ACT

§35105. Filing & Effect of Statement. Before engaging in Guam in any of the activities specified in §35104, an American lender shall execute and file with the Director of Revenue & Taxation a statement. The statement shall list its name, state of incorporation or organization, and principal place of business, shall certify that its principal activities are conducted outside Guam, and shall appoint irrevocably the Director and his successors its agents upon whom may be served process against it on any proceeding or cause of action arising out of its engaging in this Territory in any of the activities referred to in §35104. Until that statement is filed the immunities provided in this Chapter do not become operative. Upon the filing of the statement and after a determination by the Director that the American lender qualifies for exemption under this Chapter, the immunities provided by this Chapter shall continue operative until the statement is withdrawn by the American lender or cancelled by the Director pursuant to §35106, but no such withdrawal or cancellation shall retroactively affect or impair any of the immunities provided by this Chapter.

SOURCE: GC §43600.4.

GUAM CODE ANNOTATED

TITLE 11

DIVISION 4

BANKS AND BANKING

CHAPTER 106

BANKS

Article 1 Banking Practices.

2 Organization and Corporate Functions of Banks

3 Merger, Consolidation and Conversion of National and Trust Companies

4 Liquidation, Dissolution and Reorganization

5 Prohibited Practices, Sanctions

6 Branch Banks, and International Banking Corporations

7 Foreign Banking Corporation

* * *

Article 7

Foreign Banking Corporation

Part A Definitions

B Transaction of Business

C Representation Without Transaction of Business

* * *

Part A
Definitions

§106701. Definitions. As used In this Chapter:

(1) *Foreign banking corporation* means a banking corporation organized under the laws of a foreign state; and

(2) *Foreign state* means any foreign government or any department, district, province, county, possession or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or any such organization or subdivision.

SOURCE: GC §30910. Added by P.L. 13-111:5.

* * *

Part B
Transaction of Business

§106721. Right of Foreign Banking Corporation to Engage in Business.

§106722. Requirements to do Business in Territory.

§106723. Approval of Money or Securities Deposited with the Director of Administration.

§106724. Assets, Books of Account and Records in Territory for Business to be Separate: Priority of Creditors of Business in the territory.

§106725. Approval of Application; Issuance of License; Transfer; Display.

§106726. Suspension or Revocation of License.

§106727. Business Which may be Transacted in Territory.

§106728. Accepting Deposits from Foreign State or Person, etc.

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§106730. Loans Secured by Mortgages on Real Property and Acceptance of Assignments of Mortgages Covering Real Property in Territory.

§106731. Loans: Purchase or Sale of Bonds.

§106732. Report to Commissioner: Verification; Content; Formal Verification; Financial Information.

§106733. Same: Failure to Make Report or Furnish Information: Penalty; False Statements.

§106734. Failure to Comply with Chapter: Penalty.

§106735. Transaction of Business in Territory on Behalf of Foreign Banking Corporation not Authorized: Penalty.

* * *

§106721. Right of Foreign Banking Corporation to Engage in Business. A foreign banking corporation shall not engage in the banking or trust business in this Territory unless it is licensed to do so pursuant to the provisions of §106725 and unless it first complies with all the provisions of this Chapter and then only to the extent expressly permitted in this Chapter or by regulations of the Board. In transacting such business a foreign banking corporation shall comply with all applicable provisions of this Title and of the laws of this Territory.

SOURCE: GC §30920. Added by P.L. 13-111:5.

§106722. Requirements to Do Business in Territory. A foreign banking corporation shall not commence to do

business in this Territory until it has met the following requirements:

(a) It is authorized by its charter to transact the character of business described in §106727 and has complied with the laws of the country under which it is incorporated.

(b) It has filed with the Commissioner a certified copy of its charter or articles of incorporation and of its by-laws and a copy of an application for a commercial license pursuant to §72104 and 72105 of this Code.

(c) It has furnished to the Commissioner such proof of the nature and character of its business and its financial condition, stock ownership and management as he may require.

(d) It has designated the Commissioner and his successor in office by a duly executed instrument in writing, its agent, upon whom process directed to the corporation may be served. The Commissioner shall forward by mail, postage prepaid, a copy of every process served upon him under the provisions of this Subdivision, addressed to the manager or agent of such corporation at its principal place of business in this Territory. For each copy of process the Commissioner shall collect the sum of Twenty-Five Dollars ($25.00) which shall be paid by the plaintiff or moving party at the time of service, to be recovered by him as a part of his costs.

(e) It has complied with all applicable requirements of the Title 18 Guam Code annotated relating to foreign corporations except matters specifically otherwise provided for in this Title.

(f) Its manager or agent residing in this Territory has taken an oath that he will, as far as the duty devolves upon him, diligently and honestly administer the affairs of the corporation and will not knowingly violate or wilfully permit to be violated any of the provisions of law applicable to the corporation and the oath, subscribed by the manager or agent taking it, has been transmitted to the Commissioner and filed in his office.

(g) It has allocated and assigned to its Guam business a portion of its capital and surplus equal in amount to the amount of capital and surplus required by §106204 for a bank commencing to do business on Guam.

(h) It has deposited with the Director of Administration evidence of indebtedness acceptable to him which:

(1) Are payable to bearer or recorded with the Commissioner's name:

(2) Constitute readily marketable legal investments for funds held by a bank as a fiduciary; and

(3) Have a value equal to seventy-five percent (75%) of the minimum capital and surplus requirements set forth in §106204.

(i) It has received from the License Board of the Department a commercial license pursuant to §72102.

* * *

§106725. Approval of Application; Issuance of License; Transfer; Display. The Commissioner shall convey to the Board his recommendation as to whether the

application of a foreign banking corporation should be approved. The Board may, in its discretion, direct License Division of the Department to issue such license to such corporation when it is satisfied that the corporation has met all the requirements of this Chapter. The license shall authorize the corporation to transact the business permitted by §106727 at the location specified therein. No such license shall be transferrable or assignable. Each such license shall be conspicuously displayed at all times in the place of business specified therein.

* * *

§106727. Business Which May be Transacted in Territory. A foreign banking corporation which is authorized by license under §106725 may transact in this Territory the business of buying, selling, paying or collecting bills of exchange, of issuing letters of credit, of receiving money for transmission by draft, check, cable or otherwise, and of making loans. It may transact in this Territory the business of accepting deposits only as provided in §106728.

* * *

§106730. Loans Secured by Mortgages on Real Property and Acceptance of Assignments of Mortgages Covering Real Property in Territory. Nothing in this Chapter shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this Territory for the transaction of business from making loans in this Territory secured by mortgages on real property or from accepting assignments of mortgages covering real property situated in this Territory.

* * *

§106734. Failure to Comply With Chapter: Penalty. Any foreign banking corporation which is required to comply with the provisions of this Chapter and fails to do so is guilty of a misdemeanor and in addition thereto shall be liable to the people of this Territory in the sum of One Hundred Dollars ($100.00) per day for each day that such offense continues.

SOURCE: GC §30932. Added by P.L. 13-111:5

§106735. Transaction of Business in Territory on Behalf of Foreign Banking Corporation Not Authorized: Penalty. Any person who transacts business in this Territory on behalf of a foreign banking corporation which is subject to the provisions of this Chapter but which is not authorized to transact business in this territory is guilty of a misdemeanor and in addition thereto shall be liable to the people of this Territory in the sum of One Hundred Dollars ($100.00) per day for each day that such offense continues.

SOURCE: GC §30933. Added by P.L. 13-111:5.

Part C

Representation Without Transaction of Busines

§106741. Establishment and Maintenance of Office by Representative of Foreign Banking Corporation.

§106742. Maintenance of Place of Business of Representative.

§106741. Establishment and Maintenance of Office by Representative of Foreign Banking Corporation. An

individual may establish and maintain an office or offices in this Territory as a representative of one or more foreign banking corporations, but only upon first obtaining a license from the Commissioner. The application for such license shall be in such form and shall set forth such information as the Commissioner may require, and shall be accompanied by a fee of Two Hundred Fifty Dollars ($250.00). The Commissioner may grant or refuse the application in his discretion and at any time, in his discretion, revoke any such license. Such representative shall pay an annual license fee of One Hundred Dollars ($100.00) for each such office. If more than one individual representative of the same foreign banking corporation uses the same office the annual license fee shall be One Hundred Dollars ($100.00) plus Twenty-Five Dollars ($25.00) for each individual representative over one using the same office.

§106742. Maintenance of Place of Business of Representative. Any licensed representative may maintain one or more places of business as his office as such representative, but not as a place of business of the foreign banking corporation. Notwithstanding anything in this Title to the contrary, he may use an office sign at his place of business indicating that such place is the office of a representative of the particular foreign banking corporation which he represents, and he may use in his business, as such representative, the letterheads, circulars and other printed matter of such foreign banking corporation.

GUAM CODE ANNOTATED

TITLE 18

DIVISION 1

BUSINESS STRUCTURE
PART 1

CHAPTER 7
FOREIGN CORPORATIONS

§7104. Foreign corporation license. Certificate of Registration. Prerequisite. Penalty. No foreign corporation or corporation formed, organized, or existing under any laws other than those of Guam shall be permitted to transact business in Guam or maintain by itself or assignee any suit for the recovery of any debt, claim, or demand whatever, unless it shall have the foreign corporation license and certificate of registration prescribed in this Chapter.

Any officer, director, or agent of the corporation or any person transacting business for any foreign corporation not having the license prescribed shall be guilty of a petty misdemeanor.

§7105. Failure to comply. Penalty. Every foreign corporation or corporation formed, organized, or existing under any laws other than those of Guam, now or hereinafter doing business in this territory, which fails to comply with the provisions of §7101 before doing any business in Guam, shall be subject to a penalty of not less than one thousand dollars ($1,000.00), to be recovered in the Superior Court of Guam by the Attorney General.

§7106. Laws governing foreign corporations. Any foreign corporation not formed, organized, or existing

under the laws of Guam shall be bound by all laws, rules, and regulations applicable to domestic corporations of the same class, save and except such only as provided for the creation, formation, organization, or dissolution of corporations or such as fix the qualifications, relations, liabilities, responsibilities, or duties of members, stockholders, directors, or officers of the corporation to each other or to the corporation; provided, however, that nothing in this section contained shall be construed to exempt any foreign corporation from compliance with the Business License Law (11 GCA Chapter 26).

(2)

No. 99-849

In The

Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner,

vs.

THE SUPREME COURT OF GUAM, Territory of Guam,

Respondent,

THE LONG-TERM CREDIT BANK OF JAPAN, LTD.,

Real Party In Interest.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE GOVERNMENT OF GUAM, DEPARTMENT OF REVENUE AND TAXATION, IN SUPPORT OF THE POSITION OF PETITIONER EIE GUAM CORPORATION

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INTEREST OF THE AMICUS CURIAE

The Department of Revenue and Taxation of the Government of Guam (hereinafter referred to as "DRT") is part of the Executive Branch of the Government of Guam. 5 Guam Code Ann. § 3114. DRT acts as the local taxation authority for income taxes, both corporate and personal, in place and instead of the U.S. Internal Revenue Service. 48 U.S.C. § 1421i(c); 11 Guam Code Ann. § 1104. DRT is also responsible for collecting a variety of other taxes as provided for by law, including the Guam gross receipts tax. *Id.*

In addition to its taxation function, DRT is also responsible for administering and enforcing compliance with Guam's business licensing, banking, and corporation laws. 11 Guam Code Ann. § 1104(c) and (j). Because DRT is responsible for these two essential functions, taxation and business regulation, DRT has a keen interest in the outcome of petitioner's writ of certiorari.

INTRODUCTION

DRT files the instant Brief of Amicus Curiae, pursuant to Rule 37 of the Supreme Court Rules of Appellate Procedure, as a branch of the Government of Guam. DRT has elected to file this brief because it is concerned about the potential ramifications in the event that this Court should decide not to grant petitioners writ of certiorari.

DRT contends that the trial court in this case reached a legally sound decision based upon certain undisputed facts, that the Guam Supreme Court erred in reversing

that decision, and that the Ninth Circuit Court of Appeals has an obligation to correct that error. If the opinion of the Guam Supreme Court that the Long-Term Credit Bank of Japan ("LTCB") is entitled to an implied exemption from Guam's business and foreign corporation licensing laws is allowed to stand, DRT fears that foreign corporations will be encouraged to take calculated steps to minimize or even deny their corporate and business presence and activities on Guam for the purpose of evading Guam's licensing and registration statutes, as well as its tax laws.

SUMMARY OF THE ARGUMENT

The Ninth Circuit has an obligation under 48 U.S.C. § 1424-2 to monitor the recently created Guam Supreme Court and to prevent that court from issuing erroneous opinions that have a substantially adverse effect on the territory. The Guam Supreme Court opinion at issue in this case is in contradiction to the explicit provisions of Guam's statutes and directly undermines DRT's ability to perform its function as the agency responsible for regulating commerce within Guam's borders. This erroneous opinion will enable countless foreign businesses to completely avoid regulation by DRT, and even more importantly, to completely avoid paying the appropriate taxes to the Government of Guam.

Under Guam law, DRT is the agency tasked with determining (in the first instance) whether any particular

business entity, foreign or domestic, is entitled to exemption from Guam's business license laws. DRT has carefully reviewed the facts of this case as presented to the courts of Guam, and, if given the opportunity, DRT would have determined that LTCB is not entitled to an exemption from Guam's business license laws.

The Guam Supreme Court's opinion, however, eliminates DRT's discretion to make that determination by creating a blanket exemption for a huge category of foreign businesses. Given Guam's small size and its close proximity to foreign investors, the erroneous opinion will have a devastating effect on the financial condition of Guam's government. The opinion falls squarely within the class of harm that 48 U.S.C. § 1424-2 was enacted to prevent, and the Ninth Circuit has an obligation to review it.

ARGUMENT

I

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO 48 U.S.C. § 1424-2 BECAUSE IT WILL SUBSTANTIALLY IMPACT THE GOVERNMENT OF GUAM AND ITS CITIZENS

In an island economy such as Guam, many different types of foreign businesses engage in economic and commercial activities. These foreign businesses are engaged in these activities for the purpose of making money. In the course of their activities, they utilize government

facilities, contract with Guam companies, and affect Guam property and the interests of Guam's citizens.

The Government of Guam has a strong public interest in assuring that these foreign companies conduct themselves lawfully and ethically, that they comply with applicable Guam law, and that they pay their taxes when appropriate. The mechanisms enacted by the Guam Legislature to enable DRT to monitor the activities of such foreign companies are the Foreign Corporation Law and, most specially, the business license requirements set forth in 11 Guam Code Ann. Chapter 70.

Without either a business license or a statement of exemption on record, unlicensed foreign businesses do not even show up on the "radar screen" of this department. Such foreign businesses can come to Guam, engage in commercial activities, utilize Guam facilities, contract with Guam companies, affect Guam properties, implicate the rights of Guam citizens, and then sneak out of Guam with their profits and without paying taxes, placing themselves beyond the reach of Guam law. In addition, our citizens' ability to pursue their legal remedies against such foreign corporations will be severely limited by not having a party to serve. The registration of the foreign corporation provides this mechanism for our citizens.

Guam is a small jurisdiction relative to the size of any of our States. With an area of just over 200 square miles, Guam is less than one-sixth the size of the smallest State, Rhode Island, which has an area of 1,250 square miles. Guam has a population of approximately 150,000, less than half that of the least populous State, Wyoming. Guam also lacks ready access to resources available in

large cities of the United States, partly because of distance and partly because telephone communications are limited by the extreme time zone differences.

Moreover, Guam's DRT must function substantially on its own. It cannot as readily call upon the tax expertise of locally-posted IRS personnel as can the tax departments of the States. Furthermore, Guam has the burden of collecting the mirror income tax as well as the Guam Gross Receipts Tax, since the U.S. income tax is not applicable in Guam.

Guam, as the only U.S. territory in the Western Pacific, has experienced a deluge of new local and international commerce, with the concomitant demand for more and better government services to meet the expanding needs of the businesses involved. Especially for the visitor industry, more reliable electric power and other utility services, better roads, an upgraded airport, and better police and fire protection are a growing necessity; and the costs of these improvements must be shared by businesses – foreign and domestic alike – that have necessitated them. This means that foreign companies engaged in commercial activities on Guam must pay their fair share of the tax burden.

The Government of Guam, with fewer resources because of its small size and relative isolation, and with greater responsibilities, finds itself with the difficult task of administering complex tax laws in an increasingly complex and cosmopolitan world. Just identifying all of those who should be taxpayers and should be regulated is an overwhelming and near impossible task. Thus, even

more than on the U.S. mainland, tax and regulatory compliance is voluntary.

Guam's business license laws play an essential role by requiring that businesses subject to regulation and tax liability affirmatively comply with all licensing regulations. Compliance with Guam law by obtaining the required license or exemption before business is done is simple, routine and in no way burdensome. Some investors have chosen, however, to ignore these simple requirements. Thus, the penalty imposed by 11 Guam Code Ann. § 70130, namely, the threat of not being able to enforce contractual rights, provides powerful motivation for businesses to voluntarily comply.

II

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO U.S.C. § 1424-2 BECAUSE IT FAILS TO PROPERLY APPLY THE APPLICABLE PROVISIONS OF GUAM LAW

The most recent legislation in Guam pertaining to business licenses is 11 Guam Code Ann. § 70130. Section 70130 plainly requires that "all businesses" obtain either a business license or a statement of exemption. Notwithstanding the explicit language and the clear intent of § 70130, the Guam Supreme Court held that LTCB is not required to obtain either a business license or statement of exemption.

Under the clear language of Guam's statutory scheme, a DRT application under the Business License Law provides the mechanism by which the department

can assess the need for further regulatory licenses, and determine whether tax returns should be filed and whether tax revenues may be due. The licensing process, furthermore, offers the Government the opportunity to obtain any further information that it considers necessary to assess whether the Government of Guam has a substantial public interest in regulating, or even prohibiting, the particular business involved.

As just one example, a foreign corporation engaged in business in Guam was detected, a few years ago, in the act of importing slot machines, roulette wheels, and other gambling equipment that it intended to utilize in its business. It would be difficult to argue that the Government of Guam had no interest in, or right to control, such blatantly illegal activities.

11 Guam Code Ann. § 72102, like § 70130, is unambiguous. It states: "Every person engaged in or carrying on business in Guam of banking . . . shall be required annually to obtain a commercial license." It is undisputed that LTCB has not complied with the licensing requirements of 18 Guam Code Ann. § 7104 or 11 Guam Code Ann. § 72102, nor has it obtained a statement of exemption pursuant to § 70130.

Contrary to the opinion of the Guam Supreme Court, 11 Guam Code Ann. § 106730 does not exempt LTCB from the business license requirement of 11 Guam Code Ann. § 106721. Section 106730 merely states that "[n]othing in [the] Chapter" pertaining to foreign banking corporations shall be deemed to prohibit a foreign bank which does not maintain an office in this Territory from making loans in Guam. Section 106730 *does not exempt* foreign banking

corporations from complying with the other licensing laws of Guam (such as §§ 7104, 70130, and 72102) which are not contained in the "Chapter" pertaining to foreign banking corporations. Foreign banking corporations without offices on Guam can make loans and engage in business on Guam provided they comply with Guam laws.

Even if it were to be assumed, *arguendo*, that § 106730 does exempt LTCB from obtaining a business license, LTCB nevertheless is still required to obtain a statement of exemption pursuant to § 70130. The language of § 70130 makes clear that even entities explicitly exempted by statute from obtaining business licenses, such as, for example, religious organizations, are nonetheless required to obtain a statement of exemption.

Furthermore, 18 Guam Code Ann. § 7106, clearly provides that foreign corporations are bound by *all* laws, rules and regulations applicable to domestic corporations, and in particular the Business License Law. This statute could hardly be clearer. Foreign corporations are to be treated in the same manner as domestic corporations, except as provided for by the statute. The Business License Law's requirements are expressly stated to be binding upon foreign corporations, as they are upon domestic corporations.

Again, assuming, *arguendo*, that LTCB were correct in its interpretation of § 106730, LTCB has exceeded the scope of any exemption granted to it under that section. Section 106730 *at most* merely authorizes foreign banking corporations to make loans "in this territory secured by mortgages on *real property* or [to accept] assignments of

mortgages covering *real property*." 11 Guam Code Ann. § 106730 (emphasis added).

LTCB did not merely make loans "secured by mortgages on real property." LTCB also obtained security interests in the personal property and intangibles of a Guam corporation through stock pledges, assignments on Guam bank accounts, and UCC security agreements. Section 106730 does not in any manner even arguably authorize loans secured by stock pledges, Guam bank accounts, or personal property without a license. LTCB has greatly exceeded any authority granted to it under § 106730, and has committed a crime by failing to comply with this statute.[1]

III

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO 48 U.S.C. § 1424-2 BECAUSE IT UNDERMINES THE FUNCTION OF THE DRT

The administration of Guam's business licensing laws is vested in DRT. 11 Guam Code Ann. § 70104. Likewise, the administration of Guam's banking laws is vested in DRT. 11 Guam Code Ann. § 103101. Furthermore, 11 Guam Code Ann. § 70130 states that anyone entitled to an exemption "*shall* obtain a statement from the Department of Revenue and Taxation."

---

[1] 11 Guam Code Ann. § 106734 makes it a misdemeanor for a foreign banking corporation to fail to comply with the provisions of Guam's licensing laws.

It is undisputed that LTCB has never even sought an exemption from DRT. It is also undisputed that DRT *will not* grant an exemption to a foreign bank doing business in Guam.

Under well settled principles of administrative law, the procedure that LTCB *should* have followed in this case was to make an application to DRT for a certificate of exemption, pursuant to § 70130. When this application was denied, as it would have been under all of the facts of this case, LTCB – if it felt aggrieved by this administrative decision, and if it concluded that it was entitled to a certificate of exemption as a matter of law – could then have brought an administrative mandamus proceeding in the Superior Court of Guam, seeking judicial review of DRT's administrative determination. In the event that it remained unsatisfied with the Superior Court's determination in such an administrative mandamus proceeding, it could *then*, and *only* then, have appealed that determination to the Guam Supreme Court.

The general and well settled rule is that the determination of an administrative agency on the law under which it acts is entitled to substantial deference, *Chevron, USA, Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 684 (1984), and that such an administrative decision will not be disturbed unless it appears clear that such administrative interpretation is completely inconsistent with the legislative intent. *United States v. Shimer*, 367 U.S. 374, 81 S.Ct. 1554, 1560-61 (1961). In this case, however, even that liberal standard does not apply, in view of the fact that LTCB chose to ignore the administrative process entirely.

DRT is responsible for administering Guam's business licensing, banking, and tax laws. This Court *in Chevron v. Natural Resources, supra,* 104 S.Ct. at 2782, held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Although LTCB evaded any formal administrative ruling on the issue, the Director of DRT has expressly stated that a foreign banking corporation engaged in banking or other business on Guam *must* obtain the prescribed Guam licenses even if it does not maintain an office on Guam. Therefore, if LTCB has been engaged in banking or other business on Guam, it is not entitled to any exemption under § 106730.

The trial court below was not asked to rule that *all* foreign banks are ineligible for an exemption under § 106730 under any and all circumstances. All that the trial court determined was that LTCB, in this particular case, at the very least, had "engaged in commercial or other money-making activity in Guam." The Guam Supreme Court's opinion reversing the trial court's decision, however, categorically establishes that § 106730 creates a special exemption for *all* foreign banks. DRT submits that this will provide foreign banks with the means and the incentive to ignore Guam law regarding taxation and licensing.

Moreover, the Guam Supreme Court's opinion completely ignores the impact it will have on Guam's American Investors Act ("AIA"), 11 Guam Code Ann. § 35105. Pursuant the AIA, American lending institutions may make loans and receive security for loans on Guam only

after they have registered with the DRT. The Guam Supreme Court's opinion would make foreign lenders exempt from even this type of registration requirement. Thus, under the opinion, foreign lenders receive a blanket exemption from Guam's business license laws, while non-licensed U.S. banks must still comply with the AIA. In light of the AIA, the Guam Supreme Court's opinion simply makes no sense.

Under the specific facts of this case, affirming the trial court's decision would affect only LTCB and would not have any significant impact upon legitimate foreign banks that have merely obtained mortgages on real property in this jurisdiction, but have not engaged in such extensive activities in Guam as has LTCB. Each situation should be evaluated by DRT (in the first instance) based on the facts at hand. If a particular foreign bank is entitled to an exemption, DRT, upon application by that bank, will issue the appropriate certificate.

Because of the important tax basis for Guam's Business License Law, DRT is greatly concerned that if this Court does not grant certiorari, LTCB and others similarly situated will, in effect, be encouraged to evade lawful taxation. The Business License Law affords DRT an efficient mechanism for enforcing the tax laws of the territory. This mechanism is highly desirable, particularly for a small jurisdiction and island economy such as Guam, which has limited manpower to devote to investigation of tax evasion and enforcement of tax laws. It is respectfully submitted that if this Court denies certiorari, thereby granting the wholesale exemption LTCB seeks,

DRT will effectively lose one of its most important tools for collecting tax revenues and enforcing tax laws.

CONCLUSION

DRT is the government agency on Guam responsible for the administration of Guam's business licensing and taxation laws. DRT is concerned that the Guam Supreme Court has created wholesale exemptions to Guam's business license and foreign corporation statutes. In essence, the Guam Supreme Court opinion grants certain foreign corporations, and certain foreign banking corporations in particular, a privileged position that properly-licensed local and foreign companies which follow the law and pay their fair share of taxes do not enjoy.

If LTCB, or any other business, should feel that it is entitled to an exemption from the requirements of Guam law, it should apply for such exemption from DRT. It is plain, in the instant case, that LTCB has not applied for either a business license or statement of exemption because of its substantial tax liability to the Government of Guam. The Guam Supreme Court's opinion, in DRT's view, frustrates the purpose of Guam's business and foreign corporation licensing statutes and encourages foreign corporations to maintain phantom or stealth existences on Guam and to evade their fair share of taxes.

The Ninth Circuit should reverse the Guam Supreme Court's opinion and thereby affirm the decision of the trial court. This will send a clear message that if foreign corporations follow the explicit provisions of the law and play by the rules, their investments are safe on Guam; but

those who attempt to sidestep or evade the law had best be prepared to face the consequences expressly and clearly provided by Guam's statutes.

The Government of Guam, Department of Revenue and Taxation accordingly requests that Petitioner's writ of certiorari be granted.

Dated: December 16, 1999.

Respectfully submitted,

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Supreme Court U. S.
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(3)

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INTEREST OF THE AMICUS CURIAE

The Government of Guam (sometimes referred to herein as "GovGuam") acts as its own taxation authority for income taxes, both corporate and personal, in place and instead of the U.S. Internal Revenue Service. 48 U.S.C. § 1421i(c); 11 Guam Code Ann. § 1104. GovGuam also collects a variety of other taxes as provided for by law, including the Guam gross receipts tax. *Id.*

In addition to taxation, GovGuam also administers and enforces compliance with Guam's business licensing, banking, and corporation laws. 11 Guam Code Ann. § 1104(c) and (j). Because of the importance to the island of Guam of these two essential functions, taxation and business regulation, GovGuam has a keen interest in the outcome of petitioner's writ of certiorari.

INTRODUCTION

GovGuam files the instant Brief of Amicus Curiae, pursuant to Rule 37 of the Supreme Court Rules of Appellate Procedure. GovGuam has elected to file this brief because it is concerned about the potential ramifications in the event that this Court should decide not to grant petitioners writ of certiorari.

The trial court in this case reached a legally sound decision based upon certain undisputed facts. The Guam Supreme Court erred in reversing that decision, and that the Ninth Circuit Court of Appeals has an obligation to correct that error. If the opinion of the Guam Supreme Court that the Long-Term Credit Bank of Japan ("LTCB")

is entitled to an implied exemption from Guam's business and foreign corporation licensing laws is allowed to stand, foreign corporations will be encouraged to take calculated steps to minimize or even deny their corporate and business presence and activities on Guam for the purpose of evading Guam's licensing and registration statutes, as well as its tax laws.

SUMMARY OF THE ARGUMENT

The Ninth Circuit has an obligation under 48 U.S.C. § 1424-2 to monitor the recently created Guam Supreme Court and to prevent that court from issuing erroneous opinions that have a substantially adverse effect on the territory. The Guam Supreme Court opinion at issue in this case is in contradiction to the explicit provisions of Guam's statutes and directly undermines GovGuam's ability to regulate commerce within Guam's borders. This erroneous opinion will enable countless foreign businesses to completely avoid regulation, and even more importantly, to completely avoid paying the appropriate taxes to GovGuam.

Under Guam law, determining (in the first instance) whether any particular business entity, foreign or domestic, is entitled to exemption from Guam's business license laws is an administrative, and not a judicial function. In the instant case, if LTCB had utilized the proper administrative procedures, it would not have been granted an exemption from Guam's business license laws.

The Guam Supreme Court's opinion, however, eliminates GovGuam's discretion to make that determination by creating a blanket exemption for a huge category of foreign businesses. Given Guam's small size and its close proximity to foreign investors, the erroneous opinion will have a devastating effect on the financial condition of Guam's government. The opinion falls squarely within the class of harm that 48 U.S.C. § 1424-2 was enacted to prevent, and the Ninth Circuit has an obligation to review it.

ARGUMENT

I

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO 48 U.S.C. § 1424-2 BECAUSE IT WILL SUBSTANTIALLY IMPACT THE GOVERNMENT OF GUAM AND ITS CITIZENS

In an island economy such as Guam, many different types of foreign businesses engage in economic and commercial activities. These foreign businesses are engaged in these activities for the purpose of making money. In the course of their activities, they utilize government facilities, contract with Guam companies, and affect Guam property and the interests of Guam's citizens.

The Government of Guam has a strong public interest in assuring that these foreign companies conduct themselves lawfully and ethically, that they comply with applicable Guam law, and that they pay their taxes when

appropriate. The mechanisms enacted by the Guam Legislature to enable GovGuam to monitor the activities of such foreign companies are the Foreign Corporation Law and, most specially, the business license requirements set forth in 11 Guam Code Ann. Chapter 70.

Without either a business license or a statement of exemption on record, unlicensed foreign businesses do not even show up on the Government's "radar screen." Such foreign businesses can come to Guam, engage in commercial activities, utilize Guam facilities, contract with Guam companies, affect Guam properties, implicate the rights of Guam citizens, and then sneak out of Guam with their profits and without paying taxes, placing themselves beyond the reach of Guam law. In addition, our citizens' ability to pursue their legal remedies against such foreign corporations will be severely limited by not having a party to serve. The registration of the foreign corporation provides this mechanism for our citizens.

Guam is a small jurisdiction relative to the size of any of our States. With an area of just over 200 square miles, Guam is less than one-sixth the size of the smallest State, Rhode Island, which has an area of 1,250 square miles. Guam has a population of approximately 150,000, less than half that of the least populous State, Wyoming. Guam also lacks ready access to resources available in large cities of the United States, partly because of distance and partly because telephone communications are limited by the extreme time zone differences.

Moreover, Guam must collect its taxes substantially on its own. It cannot as readily call upon the tax expertise

of locally-posted IRS personnel as can the tax departments of the States. Furthermore, Guam has the burden of collecting the mirror income tax as well as the Guam Gross Receipts Tax, since the U.S. income tax is not applicable in Guam.

Guam, as the only U.S. territory in the Western Pacific, has experienced a deluge of new local and international commerce, with the concomitant demand for more and better government services to meet the expanding needs of the businesses involved. Especially for the visitor industry, more reliable electric power and other utility services, better roads, an upgraded airport, and better police and fire protection are a growing necessity; and the costs of these improvements must be shared by businesses – foreign and domestic alike – that have necessitated them. This means that foreign companies engaged in commercial activities on Guam must pay their fair share of the tax burden.

The Government of Guam, with fewer resources because of its small size and relative isolation, and with greater responsibilities, finds itself with the difficult task of administering complex tax laws in an increasingly complex and cosmopolitan world. Just identifying all of those who should be taxpayers and should be regulated is an overwhelming and near impossible task. Thus, even more than on the U.S. mainland, tax and regulatory compliance is voluntary.

Guam's business license laws play an essential role by requiring that businesses subject to regulation and tax liability affirmatively comply with all licensing regulations. Compliance with Guam law by obtaining the

required license or exemption before business is done is simple, routine and in no way burdensome. Some investors have chosen, however, to ignore these simple requirements. Thus, the penalty imposed by 11 Guam Code Ann. § 70130, namely, the threat of not being able to enforce contractual rights, provides powerful motivation for businesses to voluntarily comply.

II

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO U.S.C. § 1424-2 BECAUSE IT FAILS TO PROPERLY APPLY THE APPLICABLE PROVISIONS OF GUAM LAW

The most recent legislation in Guam pertaining to business licenses is 11 Guam Code Ann. § 70130. Section 70130 plainly requires that "all businesses" obtain either a business license or a statement of exemption. Notwithstanding the explicit language and the clear intent of § 70130, the Guam Supreme Court held that LTCB is not required to obtain either a business license or statement of exemption.

Under the clear language of Guam's statutory scheme, an application under the Business License Law provides the mechanism by which the Government can assess the need for further regulatory licenses, and determine whether tax returns should be filed and whether tax revenues may be due. The licensing process, furthermore, offers the Government the opportunity to obtain any further information that it considers necessary to assess

whether the Government of Guam has a substantial public interest in regulating, or even prohibiting, the particular business involved.

As just one example, a foreign corporation engaged in business in Guam was detected, a few years ago, in the act of importing slot machines, roulette wheels, and other gambling equipment that it intended to utilize in its business. It would be difficult to argue that the Government of Guam had no interest in, or right to control, such blatantly illegal activities.

11 Guam Code Ann. § 72102, like § 70130, is unambiguous. It states: "Every person engaged in or carrying on business in Guam of banking . . . shall be required annually to obtain a commercial license." It is undisputed that LTCB has not complied with the licensing requirements of 18 Guam Code Ann. § 7104 or 11 Guam Code Ann. § 72102, nor has it obtained a statement of exemption pursuant to § 70130.

Contrary to the opinion of the Guam Supreme Court, 11 Guam Code Ann. § 106730 does not exempt LTCB from the business license requirement of 11 Guam Code Ann. § 106721. Section 106730 merely states that "[n]othing in [the] Chapter" pertaining to foreign banking corporations shall be deemed to prohibit a foreign bank which does not maintain an office in this Territory from making loans in Guam. Section 106730 *does not exempt* foreign banking corporations from complying with the other licensing laws of Guam (such as §§ 7104, 70130, and 72102) which are not contained in the "Chapter" pertaining to foreign banking corporations. Foreign banking corporations without offices on Guam can make loans and engage in

business on Guam provided they comply with Guam laws.

Even if it were to be assumed, *arguendo*, that § 106730 does exempt LTCB from obtaining a business license, LTCB nevertheless is still required to obtain a statement of exemption pursuant to § 70130. The language of § 70130 makes clear that even entities explicitly exempted by statute from obtaining business licenses, such as, for example, religious organizations, are nonetheless required to obtain a statement of exemption.

Furthermore, 18 Guam Code Ann. § 7106, clearly provides that foreign corporations are bound by *all* laws, rules and regulations applicable to domestic corporations, and in particular the Business License Law. This statute could hardly be clearer. Foreign corporations are to be treated in the same manner as domestic corporations, except as provided for by the statute. The Business License Law's requirements are expressly stated to be binding upon foreign corporations, as they are upon domestic corporations.

Again, assuming, *arguendo*, that LTCB were correct in its interpretation of § 106730, LTCB has exceeded the scope of any exemption granted to it under that section. Section 106730 *at most* merely authorizes foreign banking corporations to make loans "in this territory secured by mortgages on *real property* or [to accept] assignments of mortgages covering *real property*." 11 Guam Code Ann. § 106730 (emphasis added).

LTCB did not merely make loans "secured by mortgages on real property." LTCB also obtained security interests in the personal property and intangibles of a

Guam corporation through stock pledges, assignments on Guam bank accounts, and UCC security agreements. Section 106730 does not in any manner even arguably authorize loans secured by stock pledges, Guam bank accounts, or personal property without a license. LTCB has greatly exceeded any authority granted to it under § 106730, and has committed a crime by failing to comply with this statute.[1]

III

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO 48 U.S.C. § 1424-2 BECAUSE IT UNDERMINES THE FUNCTION OF THE GOVERNMENT OF GUAM.

It is undisputed that LTCB has never even sought an exemption from Guam's Business License Law. It is also undisputed that the Government *will not* grant an exemption to a foreign bank doing business in Guam.

Under well settled principles of administrative law, the procedure that LTCB *should* have followed in this case was to make an application for a certificate of exemption, pursuant to § 70130. When this application was denied, as it would have been under all of the facts of this case, LTCB – if it felt aggrieved by this administrative decision, and if it concluded that it was entitled to a certificate of exemption as a matter of law – could then have brought an administrative mandamus proceeding in the Superior Court of Guam, seeking judicial review of the adverse

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[1] 11 Guam Code Ann. § 106734 makes it a misdemeanor for a foreign banking corporation to fail to comply with the provisions of Guam's licensing laws.

administrative determination. In the event that it remained unsatisfied with the Superior Court's determination in such an administrative mandamus proceeding, it could *then*, and *only* then, have appealed that determination to the Guam Supreme Court.

The general and well settled rule is that the determination of an administrative agency on the law under which it acts is entitled to substantial deference, *Chevron, USA, Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 684 (1984), and that such an administrative decision will not be disturbed unless it appears clear that such administrative interpretation is completely inconsistent with the legislative intent. *United States v. Shimer*, 367 U.S. 374, 81 S.Ct. 1554, 1560-61 (1961). In this case, however, even that liberal standard does not apply, in view of the fact that LTCB chose to ignore the administrative process entirely.

The Government of Guam administers its own business licensing, banking, and tax laws. This Court *in Chevron v. Natural Resources, supra*, 104 S.Ct. at 2782, held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Although LTCB evaded any formal administrative ruling on the issue, the position of GovGuam is that a foreign banking corporation engaged in banking or other business on Guam *must* obtain the prescribed Guam licenses even if it does not maintain an office on Guam. Therefore, if LTCB has been engaged in banking or other business on Guam, it is not entitled to any exemption under § 106730.

The trial court below was not asked to rule that *all* foreign banks are ineligible for an exemption under § 106730 under any and all circumstances. All that the trial court determined was that LTCB, in this particular case, at the very least, had "engaged in commercial or other money-making activity in Guam." The Guam Supreme Court's opinion reversing the trial court's decision, however, categorically establishes that § 106730 creates a special exemption for *all* foreign banks. This will provide foreign banks with the means and the incentive to ignore Guam law regarding taxation and licensing.

Moreover, the Guam Supreme Court's opinion completely ignores the impact it will have on Guam's American Investors Act ("AIA"), 11 Guam Code Ann. § 35105. Pursuant the AIA, American lending institutions may make loans and receive security for loans on Guam only after they have registered with the Government. The Guam Supreme Court's opinion would make foreign lenders exempt from even this type of registration requirement. Thus, under the opinion, foreign lenders receive a blanket exemption from Guam's business license laws, while non-licensed U.S. banks must still comply with the AIA. In light of the AIA, the Guam Supreme Court's opinion simply makes no sense.

Under the specific facts of this case, affirming the trial court's decision would affect only LTCB and would not have any significant impact upon legitimate foreign banks that have merely obtained mortgages on real property in this jurisdiction, but have not engaged in such extensive activities in Guam as has LTCB. Each situation should be evaluated by the appropriate administrative authority, and not the Courts (in the first instance) based

on the facts at hand. If a particular foreign bank is entitled to an exemption, upon application by that bank, it will receive the appropriate certificate.

Because of the important tax basis for Guam's Business License Law, the Government is greatly concerned that if this Court does not grant certiorari, LTCB and others similarly situated will, in effect, be encouraged to evade lawful taxation. The Business License Law affords Guam an efficient mechanism for enforcing the tax laws of the territory. This mechanism is highly desirable, particularly for a small jurisdiction and island economy such as Guam, which has limited manpower to devote to investigation of tax evasion and enforcement of tax laws. It is respectfully submitted that if this Court denies certiorari, thereby granting the wholesale exemption LTCB seeks, Guam will effectively lose one of its most important tools for collecting tax revenues and enforcing tax laws.

CONCLUSION

The Guam Supreme Court has created wholesale exemptions to Guam's business license and foreign corporation statutes that undermine the Government's ability to administer Guam's business licensing and taxation laws. In essence, the Guam Supreme Court opinion grants certain foreign corporations, and certain foreign banking corporations in particular, a privileged position that properly-licensed local and foreign companies which follow the law and pay their fair share of taxes do not enjoy.

If LTCB, or any other business, should feel that it is entitled to an exemption from the requirements of Guam

law, it should apply to the Government for such exemption. It is plain, in the instant case, that LTCB has not applied for either a business license or statement of exemption because of its substantial tax liability to the Government of Guam. The Guam Supreme Court's opinion, frustrates the purpose of Guam's business and foreign corporation licensing statutes and encourages foreign corporations to maintain phantom or stealth existences on Guam and to evade their fair share of taxes.

The Ninth Circuit should reverse the Guam Supreme Court's opinion and thereby affirm the decision of the trial court. This will send a clear message that if foreign corporations follow the explicit provisions of the law and play by the rules, their investments are safe on Guam; but those who attempt to sidestep or evade the law had best be prepared to face the consequences expressly and clearly provided by Guam's statutes.

The Government of Guam accordingly requests that Petitioner's writ of certiorari be granted.

Dated: December 16, 1999.

Respectfully submitted,

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